

UNITED STATES BANKRUPTCY COURT  
FOR THE  
DISTRICT OF MASSACHUSETTS

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A GUIDE FOR THE  
INDIVIDUAL PRO SE DEBTOR  
IN A BANKRUPTCY CASE

August 2011

## INTRODUCTION

The Court has always welcomed those individuals who wish to assert their right to file bankruptcy without the services of an attorney. The term “*pro se*” is a Latin adjective meaning “for self”, that is applied to someone who represents himself or herself without a lawyer in a court proceeding, whether as a defendant or a plaintiff and whether the matter is civil or criminal. This status is sometimes known as “*propria persona*” or “*pro per*”. This guide is for individual *pro se* filers of consumer bankruptcy cases.

The bankruptcy laws are complex and are continuously evolving. Understanding them can prove difficult, and the decisions that must be made are not always as easy as they might appear. For example, there is the decision of what chapter of bankruptcy to file and which exemptions you should claim. There is the understanding of what debts may or may not be discharged.

Many of these questions can best be answered by a competent attorney who understands these complexities. A competent bankruptcy attorney can hear all of the facts about your unique situation and can give you advice and counsel you may rely on. Nevertheless, the Court understands that some individuals will choose to “go it alone.”

This manual is prepared for that person: the individual who has made the decision to proceed with a bankruptcy filing without any legal assistance. While neither the Court nor any employee of the Court can provide legal advice,<sup>1</sup> there are a number of procedural steps in filing a bankruptcy petition and managing the case through discharge that can be complicated. The manual is intended to assist the *pro se* debtor in navigating those procedural steps. It should not be cited or relied upon as legal authority. The information in this booklet does not substitute the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the Local Rules of this Court.

In addition, the information in this booklet also does not serve as a substitute for the advice of competent legal counsel. It is necessarily limited and is intended only as a guide to some basic aspects of bankruptcy law. It does not include all of the controlling law (such as the entire Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, this Court’s Local Bankruptcy Rules, and court decisions).

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<sup>1</sup> Courts have adopted the policy that employees of the clerk’s office are prohibited from giving legal advice to the public. Courts use 28 U.S.C. § 955 to support this position, reasoning that providing legal advice some within the definition of the “practice” of law prohibited by § 955.

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## **LEGAL AUTHORITY, STATUTES AND RULES**

The letters “U.S.C.” refer to the United States Code. The number that precedes “U.S.C.” refers to the title of the U.S. Code (e.g., 11 U.S.C.). The numbers following “U.S.C.” refer to the section of the title of the U.S. Code (e.g. “11 U.S.C. § 109”).

The U.S. Bankruptcy Code is found in Title 11 of the U.S. Code. Copies of the United States Code are available at public libraries and may also be found online (links to the Code are found at the U.S. Bankruptcy Court’s website: [www.mab.uscourts.gov](http://www.mab.uscourts.gov)).

In this manual, references only to the section number refer to the section of the Bankruptcy Code (i.e., title 11).

In addition to the U.S. Code, there are Federal and Local Rules that apply to every case. Links to the Federal Rules of Bankruptcy Procedure (“Fed. R. Bankr. P.”) as well as the Local Rules for the U.S. Bankruptcy Court for the District of Massachusetts (“Local Rules”), as well as a link to Official, Procedural and Local forms are found at the U.S. Bankruptcy Court’s website: [www.mab.uscourts.gov](http://www.mab.uscourts.gov). In this manual, they are collectively referred to as the “Rules.”

If you are a *pro se* debtor you must become acquainted with the duties and obligations imposed by the Code and the Rules.

## **OVERVIEW OF THE BANKRUPTCY PROCESS**

This section will give you a quick glimpse into the bankruptcy process, the steps involved in most cases, and what a debtor must do to effectively navigate a case through this Court.

1. All debtors<sup>1</sup> must receive “an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlines the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.” § 109(h). The briefing must be obtained within 180 days **before** the petition is filed. The court may excuse this requirement if exigent circumstances exist, or in the case of disability. See § 109(h)(3), (4).

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<sup>1</sup> “The term ‘debtor’ means a person ....concerning which a case under this title has been commenced.” 11 U.S.C. § 101(13). For other definitions of terms, see § 101.

2. All debtors must use official forms, including the Means Test Calculations form (Form 22), and they must be completed accurately and filed with the Court. Forms are available at the Bankruptcy Court's website: [www.mab.uscourts.gov](http://www.mab.uscourts.gov).
3. The certificate of credit counseling must be filed with the official forms.
4. All debtors must pay the filing fee in full or:
  - a. File an Application to Waive the Filing Fee, which must be approved by the Court. See Local Rule 1006-2 (b);
  - b. File an application to Pay the Filing Fee in Installments, which must be approved by the Court. See Local Rule 1006-2 (a).
5. At least 7 days before the scheduled meeting of creditors (also referred to as a "Section 341 meeting"), all debtors must send the trustee a copy of their prior year's federal income tax return.<sup>2</sup> See Fed. R. Bankr. P. 4002; Local Rule 4002-1.
6. In addition to the tax return, at least 7 days before the scheduled meeting of creditors, all debtors must send the trustee copies of all pay stubs and other evidence of income received within the 60 day period prior to the filing of the case. See Fed. R. Bankr. P. 4002; Local Rule 4002-1.
7. If a creditor requests a copy of the tax return at least 15 days before the meeting of creditors, the debtor(s) must provide a copy to that creditor at least 7 days before the meeting. See Fed. R. Bankr. P. 4002; Local Rule 4002-1.
8. At the meeting of creditors, debtors must provide two forms of identification: a photo identification, such as a driver's license or passport, and a proof of social security number (social security card, correspondence from the Social Security Administration, IRS form W-2 or 1099). The tax return, which references the social security number, will not satisfy this requirement. See Fed. R. Bankr. P. 4002; Local Rule 4002-1.
9. All debtors must attend the meeting of creditors and be examined under oath by the trustee. Creditors are invited to attend this meeting. See § 341.
10. All debtors must cooperate with the trustee and respond to all reasonable requests for information and documents.
11. Within 45 days after the first scheduled date of the meeting of creditors, all debtors must complete a Financial Management Course approved by the Office of the United States Trustee and file a certificate of completion with the Court. See § 111, §§ 727 (a)(11) and 1328(g).

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<sup>2</sup> Debtors may also provide the trustee and/or a creditor with a transcript of the applicable tax return. A transcript is available from the Internal Revenue Service by calling 800-829-1404 or by downloading the form (Form 4506T) from their website: [www.irs.gov](http://www.irs.gov).

## **THE CONSEQUENCES OF REPEAT FILINGS**

A bankruptcy case can be dismissed for many reasons. Missing a deadline, failing to file documents and failing to obtain or file the credit counseling certificate are just some of the many reasons why a case can be dismissed. When a case is dismissed, the debtor does not receive the discharge. In other words, the debtor does not receive the debt relief that they were seeking. Perhaps more simply stated: the debtor is back where they started. While a debtor may file another case in an effort to obtain that debt relief, there are consequences of repeat filings.

### **AUTOMATIC STAY**

The filing of the bankruptcy case operates as a stay. Most debt collection activities must stop. See § 362. However, if you had a bankruptcy case pending in the past 12 months, the automatic stay will be operative upon the filing of the second case, but only for only 30 days. If you have had two cases pending in the past 12 months, no stay will take effect upon the filing of the new case. Read the code section, and the Local Rules to determine whether this may apply to you.

### **DISCHARGE**

If you have filed a bankruptcy case previously and received a discharge, the law limits how often you may receive another discharge of your debts. You may file a Chapter 7 case and receive a discharge of debts only once every 8 years. The time is calculated from the date of filing of each of the cases. You may file a Chapter 13 and receive a discharge of debt two years after a prior Chapter 13, but four years after any other chapter. See § 1328. If you file a case within these time frames, the law states that you will not receive a discharge of your debts.

## **BEFORE FILING FOR BANKRUPTCY PROTECTION**

The initial goal of a bankruptcy filing is to relieve an individual of unmanageable debt and, through the use of the allowed exemptions, to leave the individual with the means to support himself or herself and their dependents.

The bankruptcy code requires that a debtor seek credit counseling prior to filing a bankruptcy petition. In other words, explore other avenues of debt relief before deciding whether bankruptcy is the best or the debtor's only option. The Office of the United States Trustee has an approved list of credit counseling agencies for each state. The Bankruptcy Court's website has a link to the U.S. Trustee's list. This list is updated regularly.

The credit counseling briefing may be provided in person, over the telephone or via the internet. If after the counseling session, you determine that you need to seek



bankruptcy protection, you must obtain a certificate from the counseling agency attesting to the fact that you attended the briefing and you must file it with your petition. If a repayment plan was developed, then you must file it along with the credit counseling certificate.

If you must file a petition quickly and you have not obtained the credit counseling briefing, the petition may be filed without it. However, you must file a statement of “exigent circumstances” and must attend the counseling within 30 days of the filing of the petition. See § 109(h)(3)(A). The certification must be satisfactory to the Court. See § 109(h)(3)(A)(iii). Failure to obtain the certificate prior to the filing of the case, or the failure to file the certification of exigent circumstances which is satisfactory to the Court and obtain the counseling within 30 days of the bankruptcy filing will result in the case being dismissed.

## **WORKING WITH PROFESSIONALS**

### **PETITION PREPARERS**

You may work with a bankruptcy petition preparer who will assist you with the necessary paperwork. However, a preparer is not an attorney and he/she is prohibited from giving legal advice. By definition, a petition preparer is a “a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a [bankruptcy] document for filing.” See § 110(a).

Petition preparers must comply with the Bankruptcy Code which requires them to provide their tax identification number and to disclose any and all compensation you paid for the services (or were paid by someone else on your behalf). The responsibilities of petition preparers can be found in § 110. While a preparer may help you with forms, they are prohibited from advising you on which chapter you may file, what exemptions you may claim, and how secured debt may be affected in bankruptcy. In general, a preparer cannot provide you any advice on how your case may be resolved. Also, you should be aware that neither Massachusetts nor the Bankruptcy Court has any certification process for bankruptcy petition preparers, or for paralegals and other non-attorney professionals who may provide bankruptcy petition preparation services.

### **ATTORNEYS**

You may work with a licensed attorney who can give you specific legal advice and guidance, tailored to your situation.

Remember, Court personnel cannot give you legal advice. Only a licensed attorney can:

- Explain the meaning of a statutory provision or rule;

- Provide an interpretation of case law;
- Explain the result of taking or not taking action in a case;
- Help you complete forms and advise you regarding what is legally required when a form requires you to provide information;
- Advise whether jurisdiction is proper in a case;
- Advise whether a complaint properly presents a claim;
- Advise on the best procedure to accomplish a particular goal;
- Advise who should receive proper notice or service of papers.

To legally practice law in the U.S. Bankruptcy Court for the District of Massachusetts, the attorney must be a member in good standing of the bar of the U.S. District Court for the District of Massachusetts. In order to be a member of the bar of the U.S. District Court for the District of Massachusetts, the attorney must be a member of the bar of the Commonwealth of Massachusetts.

To determine whether a person is an attorney licensed to practice law in the Commonwealth of Massachusetts, visit the Board of Bar Overseers webpage: [www.massbbo.org](http://www.massbbo.org).

If you are not sure where to find a competent attorney, please visit the Bankruptcy Court's webpage for links to lawyer referral agencies. You are also encouraged to contact the Pro se Law Clerk for a referral to an agency.

### **PRO SE**

If you plan to file a bankruptcy petition without the assistance of a professional, the first step in the process is to obtain the proper forms. The official forms, authorized by the Judicial Conference of the United States, are available online at [www.mab.uscourts.gov](http://www.mab.uscourts.gov). They are available for free.

The first problem you will encounter is that you must determine which type of bankruptcy is the best for you: Chapter 7, Chapter 11, Chapter 12 or Chapter 13. Basic information about these chapters is included in this guide.

In a Chapter 7, you turn over your nonexempt assets to a trustee who then liquidates, or sells them, to pay your creditors. In Chapter 13, you propose a plan to pay your creditors over a period of time, no longer than five years. See §§ 1322-1325. You must use the Court's Official Local form for the Chapter 13 plan. Also, in the Local Rules you will find a special section for Chapter 13 rules.

In Chapter 11, individuals who have debts higher than the amounts allowable in Chapter 13 propose a plan to pay creditors over a period of time. See § 109(e). Chapter 11 also has additional reporting and accounting requirements, and there is potential for the creation of a creditors committee, all of which can be unduly burdensome and expensive. Chapter 12 is designed for family farmers or fisherman.

Because this guide can offer only basic information, you are encouraged to obtain legal advice from a qualified and experienced bankruptcy attorney.

### **PRO SE LAW CLERK**

The Court has a Pro se Law Clerk who maintains office hours in all three Divisions: Boston (Eastern), Springfield (Western) and Worcester (Central). The Pro se Law Clerk's office cannot give you legal advice.

Here are some examples of some basic questions that the Pro se Law Clerk may be able to answer for you:

- “What do I need to do to get a discharge?”
- “What do I need to file to respond to a motion?”
- “How do I serve a summons?”
- “What do I need to know about my Meeting of Creditors?” (The Section 341 meeting)
- “Can I get free legal assistance?”

Contact information for the Pro se Law Clerk's Office is found at the end of this handbook.

### **GETTING STARTED**

Bankruptcy is a complex legal world that has a vocabulary all its own. Many commonly used definitions are found in § 101. There are some other terms that you will come across. Knowing these terms will help you understand the process. For example:

- Estate: the estate is defined by § 541. Refer to this section to learn what constitutes “property of the estate.”
- Prepetition and post-petition: The term “prepetition” means before the bankruptcy petition was filed. The term “post-petition” means after the case was filed.

In addition to understanding terms, it is very important that you protect yourself and your family. Almost every document filed in a bankruptcy case is public record. While you must provide truthful and complete information in your bankruptcy schedules and related documents, you should take care not to disclose highly personal and private information.

There is only one document that requires you to provide your full social security number.<sup>3</sup> In all other filings you should provide only the last four digits of your social security number. The same applies for all account numbers disclosed (including creditor

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<sup>3</sup> Official Form B 21, Statement of Social Security Number.

account numbers, bank account numbers, brokerage and retirement accounts, etc.) on Schedules A through F, and your Statement of Financial Affairs. You should also never identify minor children and/or dependents by their name. List them only as “minor son” or “minor step daughter” or the like, and provide their ages.

### **PREPARING YOUR PAPERWORK**

Once you have obtained the necessary forms and determined which chapter you will be filing, you must complete the official forms. Before doing that, gather your paperwork: past and present bills, collection notices, pay stubs, tax returns. Obtain a copy of your credit report at [www.annualcreditreport.com](http://www.annualcreditreport.com). Open your mail. Get as much information as you can about how much you owe and to whom you owe it. As for your assets, gather as much information as you can: appraisals, insurance information, and the like.

Every question on the petition and the other documents discussed below must be answered with complete accuracy and honesty. By your signature you are swearing under the pains and penalties of perjury that each statement you make is truthful. Title 18 of the U.S. Code provides penalties, including fines and incarceration, for falsifying bankruptcy schedules, concealing assets, and other bankruptcy related crimes.

### **B1 – THE PETITION**

The petition itself is only three pages and is fairly self-explanatory. You must answer all questions that apply to you. On page 3, you must sign the petition. If it is a joint petition, both spouses must sign. An individual and a corporation may not file a joint petition.

If you own an unincorporated business, you may include that business name and the debts it owes in your petition. For example, John Doe runs a deli called JD’s Deli & Subs. It is not a corporation. His petition could identify him as John Doe d/b/a (doing business as) JD’s Deli & Subs, and include any debtors that the business owes since he is personally responsible for those debtors. If the business was incorporated, it would have to file its own bankruptcy petition.<sup>4</sup>

### **EXHIBIT D – INDIVIDUAL DEBTOR’S STATEMENT OF COMPLIANCE WITH CREDIT COUNSELING REQUIREMENT**

Read this form carefully. Check the correct boxes and file it with the petition. If the credit counseling certificate has been obtained, it should be filed with this document. In a joint case, each debtor must sign and file their own Exhibit D.

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<sup>4</sup> Corporations may not appear *pro se* even when the person seeking to represent it is the president or only stock holder.

## **MATRIX OF CREDITORS**

The Court will send a notice of the meeting of creditors to all of the creditors you list on your schedules, provided that you also list those creditors on the matrix of creditors. Unlike most of the forms discussed in this guide, there is no form that you can download, complete and file. Rather this is a form that you create. It is a typed list of all creditors and other parties that should receive notice of the bankruptcy case. See Official Local Form 1.

Providing notice of your bankruptcy is important, both for you and for your creditors. A creditor will not know that it must stop collection activities if it does not know about your bankruptcy filing. Perhaps more importantly, a debt might not be discharged if it was not scheduled and noticed properly. In addition, if you forget a creditor, you may need to amend your creditor matrix, which will require an additional fee. If your case closes and you need to reopen your case to list another creditor claim, there will be even more fees, and there is no guarantee that the Court will allow you to reopen the case or amend your schedules. And to compound all of that, if you forget to list a creditor claim in the case, your case will experience delay.

If you have more than one address for a creditor, use all addresses. If you are not sure if you owe a creditor, list them on the creditor matrix anyway. There can be no such thing as “too much notice,” especially when there may be costly consequences for insufficient notice.

## **SCHEDULES A & B: PROPERTY**

Schedule A is where you list all ownership interests you have in real estate. The size of your ownership interest is not relevant; any interest in real estate must be disclosed. This includes land, a home, investment property, a vacation home or a condominium (even if that condominium is a parking space). If you own no real estate, do not leave the form blank. Check “none” (if there is a box) or write the word “none” on the schedule. If you leave it completely blank, the Court will view this as deficient and will issue an order requiring you to file a complete schedule.

Schedule B is where you list all personal property. This schedule is never blank. Everyone owns personal property. Everything from the cash in your pocket, to your clothing, to your retirement savings, and all other items in between gets listed. Carefully read each question on the left side of the form and answer it honestly and completely. If you have no property that fits into that particular category, be sure to check the box in the “none” column.

## **SCHEDULE C: PROPERTY CLAIMED AS EXEMPT**

Section 541 describes the property that constitutes the estate. However, debtors are permitted to claim certain property exempt (or excluded) from the estate. This form – and its proper completion – is very important.

In Massachusetts, you have a choice of which exemptions you may elect to use: those available under federal bankruptcy law or those available under Massachusetts law. You must choose either the federal or the state exemptions; you cannot pick and choose or mix and match.

Even though you reside in Massachusetts, you may not be able to claim the Massachusetts exemptions (see § 542(a)(3) for more information), or if you only recently purchased your home, your exemption may be limited (see § 542(p)).

In addition, the decision of which exemptions to elect and what property to claim as exempt is a legal decision that only you can make. Neither court personnel nor a petition preparer is permitted, qualified or trained to give you this critical legal advice.

The list of federal bankruptcy exemptions may be found under § 522(d). For the state exemptions applicable to you, refer to the section on exemptions under the state law of the state that applies to you – which may or may not be Massachusetts. See e.g. § 522 (b)(3)(A).

## **SCHEDULE D: CREDITORS HOLDING SECURED CLAIMS**

Some creditors may hold a secured claim. In other words, the creditor holds a security interest in property, or what is also often referred to as collateral. The security interest gives the creditor the right to seize the property when you fail to make agreed upon loan payments. An example might include a car or real estate. It might also include (but not be limited to) household items you purchase, such as electronics, appliances, jewelry, and power tools. Schedule D requires you to list any secured interest that a creditor holds in your property.

Certain creditors also would be listed on this schedule if they have a lien against your property, such as a creditor who obtained a court judgment against you and then placed a lien or attachment on your property to “secure” payment of that judgment. Please remember, that security interests will survive a bankruptcy. If you have questions about the rights of secured creditors as it relates to your unique situation, you should consult with an attorney.

Be sure that every creditor listed on Schedule D is also listed on the creditor matrix. Please refer to Appendix 4 of the Local Rules for the U.S. Bankruptcy Court for the District of Massachusetts for Notices to the United States of America and the Commonwealth of Massachusetts.

## **SCHEDULE E: CREDITORS HOLDING UNSECURED PRIORITY CLAIMS**

Information on priority and those creditors who are entitled to priority, can be found in § 507. Creditors holding priority claims include, but are not limited to, tax authorities, domestic support obligations<sup>5</sup>, and the like. These claims are listed here on Schedule E.

Listing priority creditors does not mean that they will be discharged. Remember, you are required to list all assets and all liabilities.

Be sure that every creditor listed on Schedule E is also listed on the creditor matrix. Please refer to Appendix 4 of the Local Rules for the U.S. Bankruptcy Court for the District of Massachusetts for Notices to the United States of America and the Commonwealth of Massachusetts.

## **Schedule F: Creditors Holding Unsecured Nonpriority Claims**

In most individual cases, this schedule has the largest number of creditors. If a creditor is not secured, and is not entitled to priority, then it is an unsecured creditor and should be listed here. Common examples include but are not limited to credit card companies, utility companies, unsecured personal loans (such as from a lender, bank, relative or friend), debts owed as a co-signor on a loan, student loans and tort claims (people or property injured or damaged due to your alleged fault or wrongdoing).

Be sure that every creditor listed on Schedule F is also listed on the creditor matrix. Please refer to Appendix 4 of the Local Rules for the U.S. Bankruptcy Court for the District of Massachusetts for Notices to the United States of America and the Commonwealth of Massachusetts.

## **SCHEDULE G: EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

This schedule identifies all unexpired leases and executory contracts that you are a party to, either as the lessor or lessee or a party. For an individual the most common type of lease would involve the leasing of an automobile, but a person might also be involved in a lease for residential or commercial property. An individual involved in an unincorporated business might have many leases involving such things as copiers, computers, equipment and the like. If a business is not a corporation, then the debtor signed the leases as an individual, and debtors should list those leases on this schedule.

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<sup>5</sup> The term “domestic support obligation” can be found in 101(14A).

When in doubt as to whether to add a lessor, a lessee or any creditor to any of the schedules of debt, err on the side of caution and include their name on the appropriate schedule.

#### **SCHEDULE H: CODEBTORS**

On this schedule, identify any person or entity (such as an incorporated business) that is a co-signor or a joint obligor on any debt. You must list anyone who is responsible along with you for repaying a debt. Please note the directions regarding your spouse (if any) at the beginning of the form.

#### **SCHEDULE I: CURRENT INCOME OF INDIVIDUAL DEBTOR(S)**

This form requires you to indicate the amount of income that you, and your spouse, receive on a monthly basis from all sources. Read each question and answer it accurately and truthfully. The income of the spouse must be included by joint debtors, and by every married debtor, regardless of whether a joint petition is filed. Remember: do not include the names of dependents, only their relationship to you.

#### **SCHEDULE J: CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)**

This form requires you to identify the various monthly expenses you incur. Do not include payments for credit card debts or any other dischargeable debt (since no further payments will be due).

#### **OFFICIAL FORM 6: DECLARATION CONCERNING DEBTOR'S SCHEDULES**

You sign this form attesting under the pains of perjury that the schedules you are filing with the Court are "true and correct to the best of [your] knowledge, information and belief."

#### **OFFICIAL FORM B7: STATEMENT OF FINANCIAL AFFAIRS**

All debtors must answer questions 1 through 18. If the debtor has been in business, questions 19 through 25 must also be answered. Read each question and answer it accurately and truthfully. If a question does not apply to you, be sure you check the box that says "Not Applicable" or "None." Do not leave any question blank.



## **OFFICIAL FORM 8: CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION**

This form asks you to state what you plan to do with any property that is secured (i.e., the property you properly identified on Schedule D) or any property subject to a lease (Schedule G). Please note, that there are deadlines by which you must fulfill your stated intentions. Failure to do so will terminate the automatic stay as to the property involved. See, § 362(h).

## **OFFICIAL FORM 19A: DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER**

If you received the assistance of a bankruptcy petition preparer, this form must be completed by the preparer and filed. He or she must sign the document under the pains of perjury.

## **OFFICIAL FORM 19B: NOTICE OF DEBTOR BY NON-ATTORNEY BANKRUPTCY PETITION PREPARER**

This notice only applies if you have received the assistance of a bankruptcy petition preparer. The notice clearly states what a preparer is prohibited from doing. The debtor(s) must sign the notice and file it with the Bankruptcy Court along with the rest of the bankruptcy petition documents, statements and schedules.

## **FORM 22A: CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS TEST CALCULATION**

## **FORM 22B: CHAPTER 11 STATEMENT OF CURRENT MONTHLY INCOME**

## **FORM 22C: STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME (CHAPTER 13)**

These forms are complex and they will require much effort to complete accurately. To complete the form, you will need to know the median family income in your location as well as the IRS Guidelines for expenses and allowances. This information can be found on the Court's web site ([www.mab.uscourts.gov](http://www.mab.uscourts.gov)) or from the Office of the U.S. Trustee ([www.justice.gov/ust](http://www.justice.gov/ust)).

Debtors who file Chapter 11 must complete and file Form 22B; Debtors who file Chapter 7 must complete Form 22A; and Debtors who file Chapter 13 must complete Form 22C. Along with proper completion of the forms, Chapter 7 and 13 debtors have additional considerations and issues.

## *Chapter 7*

In Chapter 7, disabled veterans (as defined by 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period of active duty (as defined by 10 U.S.C. 101 (d)(1)) or while performing a homeland defense activity (as defined by 32 U.S.C. 901(1)) are not required to complete this form in its entirety. However, the appropriate box on the front must be checked, and the form signed and dated. The same applies to Reservists and National Guard Members who are called to active duty. Please read the exclusion language appearing in Part I, Section 1C of the form.

In addition, if the debts are not primarily consumer debts, the Form need not be completed. See Part I, Section 1B. However, your schedules should also describe the nature of the debts in order to support your position that the debts are not “consumer debts.”

All debtors must first determine what their “Currently Monthly Income” or CMI is. The definition of “Currently Monthly Income” is found in § 101(10A). If the CMI falls below the Commonwealth’s median income figures, only Parts I and II of the form need be completed. On the front page of page 1 of Form 22A, Chapter 7 debtors should check the box that says “The Presumption Does Not Arise,” then sign, date and file it.

If the CMI is over the median income, the remainder of the form must be completed. You will not know which box to check on page 1 of the form until you complete the rest of the form.

## *Chapter 13*

Form 22C determines two important factors: the length of your chapter 13 plan; and the amount of money you must commit to paying unsecured creditors.

If the CMI falls below the Commonwealth’s median income figures, your applicable commitment period as defined by § 1325(b)(4) will be no less than three years. If the CMI is over the median, your applicable commitment period is no more than 5 years. Read the form and the instructions carefully. If the form is not accurate, you may be required to amend. The Court strongly urges all Chapter 13 debtors to retain counsel.

## **INCOMPLETE FILINGS**

If you file your bankruptcy petition and do not have all of the required forms, schedules, the entire filing fee, or the creditor matrix, the Court will issue an Order to Update. This order will set forth specific deadlines to file missing documents.

For most items, you will have 14 days to file your documents, but the creditor matrix must be filed in no more than 5 days. If you do not file any document by the deadline reflected in the Order to Update, your case can be dismissed. The Order to Update

is just that: an Order from the Bankruptcy Court. Failing to comply with the order also means that you have failed to adhere to the requirements of the Bankruptcy Code. Remember, if your case is dismissed, this may impact your rights in any future case you need to file.

### **FILING THE PETITION**

Once all the forms are completed, you should deliver them in hand, or mail them to the U.S. Bankruptcy Court. Filings are accepted between 8:30 a.m. and 4:30 p.m. on business days, but the office is open until 5:00 p.m. The addresses for the Court are:

*Eastern Division/Boston:*

United States Bankruptcy Court  
John W. McCormack Post Office and Court House  
5 Post Office Square, Suite 1150  
Boston, MA 02109-3945

*Central Division/Worcester:*

United States Bankruptcy Court  
Donohue Federal Building  
595 Main Street, Room 211  
Worcester, MA 01608-2076

*Western Division/Springfield:*

United States Bankruptcy Court  
United States Courthouse  
300 State Street  
Springfield, MA 01105

While the Bankruptcy Court holds hearings in Hyannis, the Hyannis location does not accept any pleadings for filing. All pleadings should be filed in the Boston Court. Please also refer to Appendix 5 of the Local Rules for the U.S. Bankruptcy Court for the District of Massachusetts, which can be found on the Court's website: [www.mab.uscourts.gov](http://www.mab.uscourts.gov). Please note, you may file a case in any of the Courts, but your case will be assigned to the Division provided for in the Local Rules.

### **FILING FEE**

Every bankruptcy petition requires a filing fee. The fee amounts are available on the Court's website. If you are unable to pay the fee, there are two possible options. You may file an Application to Pay Filing Fee in Installments,<sup>6</sup> or you may file a request to proceed *In Forma Pauperis*, which means that you are asking that the filing fee be waived. Both applications are available on the Court's website or from the Clerk's office.

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<sup>6</sup> Official Form B 3A

To qualify for *in forma pauperis* status you must earn less than 150% of the U.S. Department of Health and Human Services poverty guidelines. Those figures are available at the Court's website as well as at our intake counters. If you believe you qualify, you must complete and file the Application for Waiver of Chapter 7 Filing Fee<sup>7</sup> and that must be approved by the judge. If your application is denied, you must pay the fee in full or you may request to pay the fee in four installments by filing an Application to Pay Filing Fee in Installments, discussed above. If you miss one of the installment payments, or if the fee is not paid in full, your case will be dismissed and no part of the filing fee can be returned. Pursuant to Local Rule 1006-2, you must pay at least \$40 as your first installment.

All filing fees must be tendered in the form of cash, a money order or a cashier's check. Personal checks are not accepted.

### **ELECTRONIC FILING**

The Court allows only registered ECF users (attorneys and for some limited purposes, creditors) to file bankruptcy documents electronically. All *pro se* debtors must file their documents manually by either mailing them or by bringing them to the Court.

While *pro se* debtors may not file documents electronically, you may view all Court filings in your case on the public computer terminals located in the Clerk's office in each Division. You may also obtain a PACER login and password, which would enable you to view documents from any computer. To obtain a PACER login and password, you must visit [www.pacer.gov](http://www.pacer.gov) and click the link for Case Search Only Registration, and complete the on-line registration form. This service is not free; there is a charge of \$.08 for every page that you view.

## **THE BANKRUPTCY PROCESS**

### **MEETING OF CREDITORS PURSUANT TO § 341(a)**

Shortly after your bankruptcy case is filed, the Court will send you and all creditors listed on your creditor matrix a "Notice of Chapter \_\_\_ Case, Meeting of Creditors, and Deadlines." In the space after chapter, the notice will indicate which chapter you filed: 7, 11, 12 or 13. This notice alerts creditors that you have filed a bankruptcy petition and they may be prohibited from taking certain actions against you or your property to collect a debt. It also informs them of key deadlines, such as:

- The time within which they have to file a Proof of Claim, if it appears that there would be assets that can be liquidated to pay creditors;

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<sup>7</sup> Official Form B 3B

- The time within which to file a complaint objecting to the discharge of their particular debt under § 522(a) or objecting to the discharge of all debtors under § 727(a); and
- The time within which to object to the property you claimed as exempt on Schedule C.

The reverse side of this notice has important information that you should read.

The notice of the meeting of creditors informs you and the creditors of a specific date, time and location for the meeting, which creditors are invited to attend. The notice also informs everyone that a trustee has been assigned to the case, and the name, address and other contact information for the trustee. It is the trustee's role to examine you at the meeting of creditors regarding your financial situation, and to determine if there are any assets that you have that may not be exempt and that he or she could liquidate (i.e., sell) to generate cash to pay creditors.

### **PREPARING FOR THE MEETING OF CREDITORS**

The Bankruptcy Code and the Local Rules require that you provide the trustee no less than 7 days prior to the scheduled Meeting of Creditors with a copy of your most recently filed federal income tax return. Also, if a creditor requests a copy of your tax return at least 15 days before the Meeting of Creditors, then you must also provide a copy of your return to that creditor. In both instances, you must delete or black out certain private information, such as the names of your children, account numbers (except the last 4 digits), dates of birth (except the year), and you must only give the last four digits of your social security number. Failure to provide the tax return as required by law may result in dismissal of your bankruptcy case. And remember, dismissal may impact the imposition or length of the automatic stay in any subsequent case filed within 12 months.

The meeting of creditors generally lasts less than 10 minutes. You must bring two forms of identification with you to the meeting. The first is photo identification: driver's license, passport, etc. The second is something with your social security number on it: a social security card, a W-2, an IRS Form 1099. Your income tax return will not suffice because it is a document prepared by you. These documents will be reviewed by the trustee to confirm that you are who you say you are in the petition.

All § 341 Meetings are recorded on audio tape or by digital recorder. After you are administered an oath<sup>8</sup>, the trustee will then ask you to verify that you completed the petition and schedules and that they are truthful and accurate. You can expect questions to be asked. You are responsible for answering them truthfully and accurately.

Assuming you have made complete, truthful and accurate disclosures, and that the trustee is satisfied with the responses to the questions posed at the Meeting of Creditors

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<sup>8</sup> Remember, any question that you fail to answer truthfully may subject you to federal prosecution for perjury.

and there are no assets that he or she may sell, then he or she will file a “no asset report” with the Court. This report tells the Court and everyone else that the trustee has examined you and has found no nonexempt assets that can be sold for the benefit of creditors.

### **AFTER THE MEETING OF CREDITORS**

Creditors and the trustee have a deadline of 60 days following the date of the first scheduled creditor’s meeting to file a complaint objecting to your discharge. Extensions of that deadline may be allowed if requested by filing a timely motion with the Court. The deadline is stated on the creditor’s meeting notice sent to you shortly after filing. If that deadline passes, and there is no complaint objecting to your discharge, and no extension of time has been allowed, the court will enter a discharge. Simply stated, the discharge relieves you of any personal liability for all dischargeable debts listed in your bankruptcy schedules.

### **FINANCIAL MANAGEMENT COURSE**

You will not receive a discharge unless you have taken a course in personal financial management. You must file a certificate of completion with the Court within the 45 day period following the date of the first scheduled creditor’s meeting. If you do not complete this course, and if you do not file the certificate before the deadline to object to your discharge expires, your case will close without the discharge being entered. You will then need to file a Motion to Reopen your case, pay the fee so you may file your certificate and receive your discharge. This cost can be avoided if you adhere to the deadlines.

### **BANKRUPTCY CRIME**

If you hide assets or property from the trustee, or fail to disclose information accurately and completely on your schedules, you may be prosecuted by the United States Attorney for a bankruptcy crime under Title 18 of the U.S. Code.

The trustee represents the interests of the creditors. You are required by law to cooperate with the trustee and to disclose all assets, wherever located and by whomever held, that you may have any interest in whatsoever. Failure to cooperate with the trustee may cause the trustee to file a complaint objecting to your discharge under § 727(a). If a complaint is filed against you by any party challenging your discharge, that complaint would be heard by the bankruptcy judge assigned to your case.

### **MOTIONS, HEARINGS AND COURT APPEARANCES**

During a bankruptcy case, circumstances may call for you to obtain an order from the Court. For example, if you have received an Order to Update that requires you to file a document by a certain date, and you need more time to file it, you must request an extension of time. This is accomplished by a motion.

A motion is a request to the judge for relief, or for a decision on a particular matter. The party filing the motion is generally referred to as the “moving party” or the “movant.” Some motions or requests may be made orally in open court, but in bankruptcy, most motions must be made in writing.

In the written motion, the moving party makes the request and then explains to the court why the relief is requested. The Court may act on the motion without a hearing under appropriate circumstances.

The Federal Rules of Bankruptcy Procedure as well as the Local Rules of the U.S. Bankruptcy Court for the District of Massachusetts have a variety provisions dealing with motions, as well as provisions on how to respond to motions. If you need to file a motion, or if you need to respond to a motion, it is very important that you become acquainted with those rules.

To avoid delay of the relief being granted, or to avoid the motion being denied, it is very important to ensure that your motion was appropriately served on the parties.

## **HEARINGS**

From time to time, the Court will schedule a hearing on a motion. When that occurs, the Court will notify you. If you are the moving party, you will receive a notice of hearing. In most circumstances, the notice of hearing will direct you to serve a copy of the notice on all parties and to file a certificate of service demonstrating that you complied.

Time and dates of hearings are scheduled days and sometimes weeks in advance. If you have a conflict, you should immediately request a new date by filing a Motion to Continue Hearing and serving all parties. If you have not heard back from the Court prior to the scheduled hearing date, you are then encouraged to call the Case Administrator to see if your Motion to Continue Hearing was allowed or denied. If the motion was denied, you will need to appear at the hearing. To learn who your Case Administrator is, go to “Contact Court Staff” > “Phone Numbers” on the Court’s website: [www.mab.uscourts.gov](http://www.mab.uscourts.gov).

## **CERTIFICATES OF SERVICE**

A certificate of service is a written statement filed with the Court indicating that you mailed copies of a particular pleading, notice or motion to all appropriate parties. To determine who are the appropriate parties, you should determine (1) who has filed an appearance in your case; (2) who is the trustees assigned to your case; (3) who has requested notice in your case; and (4) what the Federal Rules of Bankruptcy Procedure and

the Local Rules for the U.S. Bankruptcy Court for the District of Massachusetts state are the necessary and appropriate parties to serve.

Certificates of service are important. They provide the Court with clear proof that service has been accomplished, and parties have been notified of their right and their opportunity to be heard. Motions can be denied, and hearings may be delayed if a certificate of service is deficient or was never filed.

The certificate of service needs to be included with the pleading you are filing and it must be signed by you. The certificate must state the following:

- The date of service
- The method of service (mail, overnight courier, fax, email, by hand, etc.)
- The names and addresses of the parties served

For additional reading on Certificates of Service, please see Local Rule 9013-3 and Fed. R. Bankr. P. 2002.

## **COURT APPEARANCES**

Arrive to Court on time. Be sure you dress appropriately: your hearing will be in a U.S. Bankruptcy Court, and the decision made by a U.S. Bankruptcy Judge. Consider wearing what you might wear if you were to attend a religious service on a holiday, or if you were to attend an important job interview.

Please plan accordingly for traffic, public transportation and parking. Consider making alternative child care arrangements so your attention can be focused exclusively on the legal and factual issues that are scheduled to be heard. All court buildings have security, and in Boston, you will need to go through two security screenings: one for the Federal Building, and one for the court. *Pro se* debtors are not permitted to carry cell phones into Court and you will be required to leave them with security.

Be prepared to answer the Court's questions and to respond to any arguments or statements made by other parties. Be courteous and respectful at all times. While you may be *pro se*, you are expected to comport to the level of dignity and decorum expected of anyone appearing before the Court. You are also expected to have an understanding of the law and facts that concern the issue that is before the Court.

## **ADVERSARY PROCEEDINGS**

### **ADVERSARY PROCEEDINGS**

Adversary proceedings are a separate process in a bankruptcy. In an adversary proceeding, there is a plaintiff and a defendant, rather than a creditor and a debtor. The



plaintiff initiates the adversary proceeding, and the defendant is the responding or defending party.

The rules that govern adversary proceedings are found in Part VII of the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 7001 identifies the types of actions that would be considered adversary proceedings. A creditor may find itself as a defendant in an adversary proceeding if they received a preferential payment, or if the debtor seeks to determine whether a particular debt is discharged. A creditor may also be a plaintiff in an adversary proceeding if the creditor seeks a determination of nondischargeability of their particular debt.

Whether you are bringing an adversary proceeding, or find yourself defending an adversary proceeding it is important to know that adversary proceedings can be exceptionally complicated. The procedural rules are identical in most respects to the Federal Rules of Civil Procedure. Discovery mechanisms such as depositions and requests for production might be utilized. The Court's final decisions will be based on evidence. Those final decisions may be based on motions (see e.g. Fed. R. Bankr. P. 7056) or following a trial, where witnesses are examined and cross examined and documents are admitted into evidence. The rules relating to evidence admissibility are found in the Federal Rules of Evidence. If you are contemplating bringing an adversary proceeding, or if you find yourself as a party in an adversary proceeding, you are strongly encouraged to confer with legal counsel or the Pro se Law Clerk.

## Chapter 7: Liquidation under the Bankruptcy Code

*The chapter of the Bankruptcy Code providing for "liquidation," ( i.e., the sale of a debtor's nonexempt property and the distribution of the proceeds to creditors.)*

### Alternatives to Chapter 7

Debtors should be aware that there are several alternatives to chapter 7 relief. For example, debtors who are engaged in business, including corporations, partnerships, and sole proprietorships, may prefer to remain in business and avoid liquidation. Such debtors should consider filing a petition under chapter 11 of the Bankruptcy Code. Under chapter 11, the debtor may seek an adjustment of debts, either by reducing the debt or by extending the time for repayment, or may seek a more comprehensive reorganization. Sole proprietorships may also be eligible for relief under chapter 13 of the Bankruptcy Code.

In addition, individual debtors who have regular income may seek an adjustment of debts under chapter 13 of the Bankruptcy Code. A particular advantage of chapter 13 is that it provides individual debtors with an opportunity to save their homes from foreclosure by allowing them to "catch up" past due payments through a payment plan. Moreover, the court may dismiss a chapter 7 case filed by an individual whose debts are primarily consumer rather than business debts if the court finds that the granting of relief would be an abuse of chapter 7. 11 U.S.C. § 707(b).

If the debtor's "current monthly income"<sup>1</sup> is more than the state median, the Bankruptcy Code requires application of a "means test" to determine whether the chapter 7 filing is presumptively abusive. Abuse is presumed if the debtor's aggregate current monthly income over 5 years, net of certain statutorily allowed expenses, is more than (i) \$11,725, or (ii) 25% of the debtor's nonpriority unsecured debt, as long as that amount is at least \$7,025.<sup>2</sup> The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income. Unless the debtor overcomes the presumption of abuse, the case will generally be converted to chapter 13 (with the debtor's consent) or will be dismissed. 11 U.S.C. § 707(b)(1).

Debtors should also be aware that out-of-court agreements with creditors or debt

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<sup>1</sup> The "current monthly income" received by the debtor is a defined term in the Bankruptcy Code and means the average monthly income received over the six calendar months before commencement of the bankruptcy case, including regular contributions to household expenses from nondebtors and including income from the debtor's spouse if the petition is a joint petition, but not including social security income or certain payments made because the debtor is the victim of certain crimes. 11 U.S.C. § 101(10A).

<sup>2</sup> To determine whether a presumption of abuse arises, all individual debtors with primarily consumer debts who file a chapter 7 case must complete Official Bankruptcy Form B22A, entitled "Statement of Current Monthly Income and Means Test Calculation - For Use in Chapter 7." (The Official Forms may be purchased at legal stationery stores or downloaded from the internet at [www.uscourts.gov/bkforms/index.html](http://www.uscourts.gov/bkforms/index.html). They are also available from the court.)

counseling services may provide an alternative to a bankruptcy filing.

## **Background**

A chapter 7 bankruptcy case does not involve the filing of a plan of repayment as in chapter 13. Instead, the bankruptcy trustee gathers and sells the debtor's nonexempt assets and uses the proceeds of such assets to pay holders of claims (creditors) in accordance with the provisions of the Bankruptcy Code. Part of the debtor's property may be subject to liens and mortgages that pledge the property to other creditors. In addition, the Bankruptcy Code will allow the debtor to keep certain "exempt" property; but a trustee will liquidate the debtor's remaining assets. Accordingly, potential debtors should realize that the filing of a petition under chapter 7 may result in the loss of property.

## **Eligibility**

To qualify for relief under chapter 7 of the Bankruptcy Code, the debtor may be an individual, a partnership, or a corporation or other business entity. 11 U.S.C. §§ 101(41), 109(b). Subject to the means test described above for individual debtors, relief is available under chapter 7 irrespective of the amount of the debtor's debts or whether the debtor is solvent or insolvent. An individual cannot file under chapter 7 or any other chapter, however, if during the preceding 180 days a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court, or the debtor voluntarily dismissed the previous case after creditors sought relief from the

bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e).

In addition, no individual may be a debtor under chapter 7 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

One of the primary purposes of bankruptcy is to discharge certain debts to give an honest individual debtor a "fresh start." The debtor has no liability for discharged debts. In a chapter 7 case, however, a discharge is only available to individual debtors, not to partnerships or corporations. 11 U.S.C. § 727(a)(1). Although an individual chapter 7 case usually results in a discharge of debts, the right to a discharge is not absolute, and some types of debts are not discharged. Moreover, a bankruptcy discharge does not extinguish a lien on property.

## **How Chapter 7 Works**

A chapter 7 case begins with the debtor filing a petition with the bankruptcy court serving the area where the individual lives or where the business debtor is organized or has its principal place of

business or principal assets.<sup>3</sup> In addition to the petition, the debtor must also file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a statement of financial affairs; and (4) a schedule of executory contracts and unexpired leases. Fed. R. Bankr. P. 1007(b). Debtors must also provide the assigned case trustee with a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case (including tax returns for prior years that had not been filed when the case began). 11 U.S.C. § 521.

Individual debtors with primarily consumer debts have additional document filing requirements. They must file: a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. *Id.* A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). Even if filing jointly, a husband and wife are subject to all the document filing requirements of individual debtors. (The Official Forms may be downloaded from the internet at [www.uscourts.gov/bkforms/index.html](http://www.uscourts.gov/bkforms/index.html). Forms are also available at the Court.)

The courts must charge a \$245 case filing fee, a \$39 miscellaneous administrative fee, and a \$15 trustee surcharge (\$299).

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<sup>3</sup> An involuntary chapter 7 case may be commenced under certain circumstances by a petition filed by creditors holding claims against the debtor. 11 U.S.C. § 303.

Normally, the fees must be paid to the clerk of the court upon filing. With the court's permission, however, individual debtors may pay in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Local Rules 1006-1, 1006-2;<sup>4</sup> Bankruptcy Court Miscellaneous Fee Schedule, Item 8. The number of installments is limited to four, and the debtor must make the final installment no later than 120 days after filing the petition. Fed. R. Bankr. P. 1006. For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after filing the petition. *Id.* The debtor may also pay the \$39 administrative fee and the \$15 trustee surcharge in installments. If a joint petition is filed, only one filing fee, one administrative fee, and one trustee surcharge are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 707(a).

If the debtor's income is less than 150% of the poverty level (as defined in the Bankruptcy Code), and the debtor is unable to pay the chapter 7 fees even in installments, the court may waive the requirement that the fees be paid. 28 U.S.C. § 1930(f).

In order to complete the Official Bankruptcy Forms that make up the petition, statement of financial affairs, and schedules, the debtor must provide the following information:

- A list of all creditors and the amount and nature of their claims;
- The source, amount, and frequency of the debtor's income;

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<sup>4</sup> The term "Local Rule" refers to the Local Bankruptcy Rules, United States Bankruptcy Court, District of Massachusetts.

- A list of all of the debtor's property; and
- A detailed list of the debtor's monthly living expenses, i.e., food, clothing, shelter, utilities, taxes, transportation, medicine, etc.

Married individuals must gather this information for their spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only one spouse is filing. In a situation where only one spouse files, the income and expenses of the non-filing spouse are required so that the court, the trustee and creditors can evaluate the household's financial position.

Among the schedules that an individual debtor will file is a schedule of "exempt" property. The Bankruptcy Code allows an individual debtor<sup>5</sup> to protect some property from the claims of creditors because it is exempt under federal bankruptcy law or under the laws of the debtor's home state. 11 U.S.C. § 522(b). Many states have taken advantage of a provision in the Bankruptcy Code that permits each state to adopt its own exemption law in place of the federal exemptions. In other jurisdictions, the individual debtor has the option of choosing between a federal package of exemptions or the exemptions available under state law. Thus, whether certain property is exempt and may be kept by the debtor is often a question of state law. The debtor should consult an attorney to determine the exemptions available in the state where the debtor lives.

Filing a petition under chapter 7 "automatically stays" (stops) most

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<sup>5</sup> Each debtor in a joint case (both husband and wife) can claim exemptions under the federal bankruptcy laws. 11 U.S.C. § 522(m).

collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. But filing the petition does not stay certain types of actions listed under 11 U.S.C. § 362(b), and the stay may be effective only for a short time in some situations. See 11 U.S.C. § 362(c). The stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally may not initiate or continue lawsuits, wage garnishments, or even telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Between 20 and 40 days after the petition is filed, the case trustee (described below) will hold a meeting of creditors. If the U.S. trustee or bankruptcy administrator<sup>6</sup> schedules the meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the order for relief. Fed. R. Bankr. P. 2003(a). During this meeting, the trustee places the debtor under oath, and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding the debtor's financial affairs and property. 11 U.S.C. § 343. If a husband and wife

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<sup>6</sup> In North Carolina and Alabama, bankruptcy administrators perform similar functions that U.S. trustees perform in the remaining 48 states. These duties include establishing a panel of private trustees to serve as trustees in chapter 7 cases and supervising the administration of cases and trustees in cases under chapters 7, 11, 12, and 13 of the Bankruptcy Code. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the U.S. trustee program is administered by the Department of Justice. For purposes of this publication, references to U.S. trustees are also applicable to bankruptcy administrators.

have filed a joint petition, they both must attend the creditors' meeting and answer questions. Within 10 days of the creditors' meeting, the U.S. trustee will report to the court whether the case should be presumed to be an abuse under the means test described in 11 U.S.C. § 704(b).

It is important for the debtor to cooperate with the trustee and to provide any financial records or documents that the trustee requests. The Bankruptcy Code requires the trustee to ask the debtor questions at the meeting of creditors to ensure that the debtor is aware of the potential consequences of seeking a discharge in bankruptcy such as the effect on credit history, the ability to file a petition under a different chapter, the effect of receiving a discharge, and the effect of reaffirming a debt. Some trustees provide written information on these topics at or before the meeting to ensure that the debtor is aware of this information. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending the meeting of creditors. 11 U.S.C. § 341(c).

In order to accord the debtor complete relief, the Bankruptcy Code allows the debtor to convert a chapter 7 case to a case under chapter 11, 12, or 13<sup>7</sup> as long as the debtor is eligible to be a debtor under the new chapter. However, a condition of the debtor's voluntary conversion is that the case has not previously been converted to chapter 7

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<sup>7</sup> A fee is charged for converting, on request of the debtor, a case under chapter 7 to a case under chapter 11. The fee charged is the difference between the filing fee for a chapter 7 and the filing fee for a chapter 11. 28 U.S.C. § 1930(a). Currently, the difference is \$755. *Id.* There is no fee for converting from chapter 7 to chapter 13.

from another chapter. 11 U.S.C. § 706(a). Thus, the debtor will not be permitted to convert the case repeatedly from one chapter to another.

## **The Role of the Chapter 7 Trustee**

When a chapter 7 petition is filed, the U.S. trustee (or the bankruptcy court in Alabama and North Carolina) appoints an impartial case trustee to administer the case and liquidate the debtor's nonexempt assets. 11 U.S.C. §§ 701, 704. If all the debtor's assets are exempt or subject to valid liens, the trustee will normally file a "no asset" report with the court, and there will be no distribution to unsecured creditors. Most chapter 7 cases involving individual debtors are no asset cases. But if the case appears to be an "asset" case at the outset, unsecured creditors<sup>8</sup> must file their claims with the court within 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c). A governmental unit, however, has 180 days from the date the case is filed to file a claim. 11 U.S.C. § 502(b)(9).

In the typical no asset chapter 7 case, there is no need for creditors to file proofs of claim because there will be no distribution. If the trustee later recovers assets for distribution to unsecured creditors, the Bankruptcy Court will provide notice to creditors and will allow additional time to file proofs of claim. Although a secured creditor does not

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<sup>8</sup> Unsecured debts generally may be defined as those for which the extension of credit was based purely upon an evaluation by the creditor of the debtor's ability to pay, as opposed to secured debts, for which the extension of credit was based upon the creditor's right to seize collateral on default, in addition to the debtor's ability to pay.

need to file a proof of claim in a chapter 7 case to preserve its security interest or lien, there may be other reasons to file a claim. A creditor in a chapter 7 case who has a lien on the debtor's property should consult an attorney for advice.

Commencement of a bankruptcy case creates an "estate." The estate technically becomes the temporary legal owner of all the debtor's property. It consists of all legal or equitable interests of the debtor in property as of the commencement of the case, including property owned or held by another person if the debtor has an interest in the property. Generally speaking, the debtor's creditors are paid from nonexempt property of the estate.

The primary role of a chapter 7 trustee in an asset case is to liquidate the debtor's nonexempt assets in a manner that maximizes the return to the debtor's unsecured creditors. The trustee accomplishes this by selling the debtor's property if it is free and clear of liens (as long as the property is not exempt) or if it is worth more than any security interest or lien attached to the property and any exemption that the debtor holds in the property.

The trustee may also attempt to recover money or property under the trustee's "avoiding powers." The trustee's avoiding powers include the power to: set aside preferential transfers made to creditors within 90 days before the petition; undo security interests and other prepetition transfers of property that were not properly perfected under nonbankruptcy law at the time of the petition; and pursue nonbankruptcy claims such as fraudulent conveyance and bulk transfer remedies available under state law. In addition, if the debtor is a business, the bankruptcy court may authorize the trustee to

operate the business for a limited period of time, if such operation will benefit creditors and enhance the liquidation of the estate. 11 U.S.C. § 721.

Section 726 of the Bankruptcy Code governs the distribution of the property of the estate. Under § 726, there are six classes of claims; and each class must be paid in full before the next lower class is paid anything. The debtor is only paid if all other classes of claims have been paid in full. Accordingly, the debtor is not particularly interested in the trustee's disposition of the estate assets, except with respect to the payment of those debts which for some reason are not dischargeable in the bankruptcy case. The individual debtor's primary concerns in a chapter 7 case are to retain exempt property and to receive a discharge that covers as many debts as possible.

## **The Chapter 7 Discharge**

A discharge releases individual debtors from personal liability for most debts and prevents the creditors owed those debts from taking any collection actions against the debtor. Because a chapter 7 discharge is subject to many exceptions, debtors should consult competent legal counsel before filing to discuss the scope of the discharge. Generally, excluding cases that are dismissed or converted, individual debtors receive a discharge in more than 99 percent of chapter 7 cases. In most cases, unless a party in interest files timely a complaint objecting to the discharge or a motion to extend the time to object, the bankruptcy court will issue a discharge order relatively early in the case – generally, 60 to 90 days after the date first set for the meeting of creditors. Fed. R. Bankr. P. 4004(c).

The grounds for denying an individual debtor a discharge in a chapter 7 case are narrow and are construed against the moving party. Among other reasons, the court may deny the debtor a discharge if it finds that the debtor: failed to keep or produce adequate books or financial records; failed to explain satisfactorily any loss of assets; committed a bankruptcy crime such as perjury; failed to obey a lawful order of the bankruptcy court; fraudulently transferred, concealed, or destroyed property that would have become property of the estate; or failed to complete an approved instructional course concerning financial management. 11 U.S.C. § 727; Fed. R. Bankr. P. 4005.

Secured creditors may retain some rights to seize property securing an underlying debt even after a discharge is granted. Depending on individual circumstances, if a debtor wishes to keep certain secured property (such as an automobile), he or she may decide to "reaffirm" the debt. A reaffirmation is an agreement between the debtor and the creditor that the debtor will remain liable and will pay all or a portion of the money owed, even though the debt would otherwise be discharged in the bankruptcy. In return, the creditor promises that it will not repossess or take back the automobile or other property so long as the debtor continues to pay the debt.

If the debtor decides to reaffirm a debt, he or she must do so before the discharge is entered. The debtor must sign a written reaffirmation agreement and file it with the court. 11 U.S.C. § 524(c). The Bankruptcy Code requires that reaffirmation agreements contain an extensive set of disclosures described in 11 U.S.C. § 524(k); see also Local Rule,

Official Local Form 6. Among other things, the disclosures must advise the debtor of the amount of the debt being reaffirmed and how it is calculated and that reaffirmation means that the debtor's personal liability for that debt will not be discharged in the bankruptcy. The disclosures also require the debtor to sign and file a statement of his or her current income and expenses which shows that the balance of income paying expenses is sufficient to pay the reaffirmed debt. If the balance is not enough to pay the debt to be reaffirmed, there is a presumption of undue hardship, and the court may decide not to approve the reaffirmation agreement. Unless the debtor is represented by an attorney, the bankruptcy judge must approve the reaffirmation agreement.

If the debtor was represented by an attorney in connection with the reaffirmation agreement, the attorney must certify in writing that he or she advised the debtor of the legal effect and consequences of the agreement, including a default under the agreement. The attorney must also certify that the debtor was fully informed and voluntarily made the agreement and that reaffirmation of the debt will not create an undue hardship for the debtor or the debtor's dependants. 11 U.S.C. § 524(k). The Bankruptcy Code requires a reaffirmation hearing if the debtor has not been represented by an attorney during the negotiating of the agreement, or if the court disapproves the reaffirmation agreement. 11 U.S.C. § 524(d) and (m). The debtor may repay any debt voluntarily, however, whether or not a reaffirmation agreement exists. 11 U.S.C. § 524(f).



An individual receives a discharge for most of his or her debts in a chapter 7 bankruptcy case. A creditor may no longer initiate or continue any legal or other action against the debtor to collect a discharged debt. But not all of an individual's debts are discharged in chapter 7. Debts not discharged include debts for alimony and child support, certain taxes, debts for certain educational benefit overpayments or loans made or guaranteed by a governmental unit, debts for willful and malicious injury by the debtor to another entity or to the property of another entity, debts for death or personal injury caused by the debtor's operation of a motor vehicle while the debtor was intoxicated from alcohol or other substances, and debts for certain criminal restitution orders. 11 U.S.C. § 523(a). The debtor will continue to be liable for these types of debts to the extent that they are not paid in the chapter 7 case. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting

in a fiduciary capacity, and debts for willful and malicious injury by the debtor to another entity or to the property of another entity will be discharged unless a creditor timely files and prevails in an action to have such debts declared nondischargeable. 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c).

The court may revoke a chapter 7 discharge on the request of the trustee, a creditor, or the U.S. trustee if the discharge was obtained through fraud by the debtor, if the debtor acquired property that is property of the estate and knowingly and fraudulently failed to report the acquisition of such property or to surrender the property to the trustee, or if the debtor (without a satisfactory explanation) makes a material misstatement or fails to provide documents or other information in connection with an audit of the debtor's case. 11 U.S.C. § 727(d).

## **Chapter 11: Reorganization under the Bankruptcy Code**

*The chapter of the Bankruptcy Code providing (generally) for reorganization, usually involving a corporation or partnership. (A chapter 11 debtor usually proposes a plan of reorganization to keep its business alive and pay creditors over time. People in business or individuals can also seek relief in chapter 11.)*

### **Background**

A case filed under chapter 11 of the United States Bankruptcy Code is frequently referred to as a "reorganization" bankruptcy.

An individual cannot file under chapter 11 or any other chapter if, during the preceding 180 days, a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court, or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d)-(e).

In addition, no individual may be a debtor under chapter 11 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt

management plan is developed during required credit counseling, it must be filed with the court.

### **How Chapter 11 Works**

A chapter 11 case begins with the filing of a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. A petition may be a voluntary petition, which is filed by the debtor, or it may be an involuntary petition, which is filed by creditors that meet certain requirements. 11 U.S.C. §§ 301, 303. A voluntary petition must adhere to the format of Form 1 of the Official Forms prescribed by the Judicial Conference of the United States. Unless the court orders otherwise, the debtor also must file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement of financial affairs. Fed. R. Bankr. P. 1007(b). If the debtor is an individual (or husband and wife), there are additional document filing requirements. Such debtors must file: a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. 11 U.S.C. § 521. A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (The Official Forms are available from the court, may be purchased at legal stationery stores or downloaded from the

Internet at  
[www.uscourts.gov/bkforms/index.html](http://www.uscourts.gov/bkforms/index.html).)

The courts are required to charge a \$1,000 case filing fee and a \$39 miscellaneous administrative fee. The fees must be paid to the clerk of the court upon filing or may, with the court's permission, be paid by individual debtors in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. Fed. R. Bankr. P. 1006(b) limits to four the number of installments for the filing fee. The final installment must be paid not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after the filing of the petition. Fed. R. Bankr. P. 1006(b). The \$39 administrative fee may be paid in installments in the same manner as the filing fee. If a joint petition is filed, only one filing fee and one administrative fee are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 1112(b)(10).

The voluntary petition will include standard information concerning the debtor's name(s), social security number or tax identification number, residence, location of principal assets (if a business), the debtor's plan or intention to file a plan, and a request for relief under the appropriate chapter of the Bankruptcy Code. Upon filing a voluntary petition for relief under chapter 11 or, in an involuntary case, the entry of an order for relief, the debtor automatically assumes an additional identity as the "debtor in possession." 11 U.S.C. § 1101. The term refers to a debtor that keeps possession and control of its assets while undergoing

a reorganization under chapter 11, without the appointment of a case trustee. A debtor will remain a debtor in possession until the debtor's plan of reorganization is confirmed, the debtor's case is dismissed or converted to chapter 7, or a chapter 11 trustee is appointed. The appointment or election of a trustee occurs only in a small number of cases. Generally, the debtor, as "debtor in possession," operates the business and performs many of the functions that a trustee performs in cases under other chapters. 11 U.S.C. § 1107(a).

Generally, a written disclosure statement and a plan of reorganization must be filed with the court. 11 U.S.C. §§ 1121, 1125. The disclosure statement is a document that must contain information concerning the assets, liabilities, and business affairs of the debtor sufficient to enable a creditor to make an informed judgment about the debtor's plan of reorganization. 11 U.S.C. § 1125. The information required is governed by judicial discretion and the circumstances of the case. In a "small business case" (discussed below) the debtor may not need to file a separate disclosure statement if the court determines that adequate information is contained in the plan. 11 U.S.C. § 1125(f); see also, Local Rules, Official Local Form 15.

The contents of the plan must include a classification of claims and must specify how each class of claims will be treated under the plan. 11 U.S.C. § 1123. Creditors whose claims are "impaired," i.e., those whose contractual rights are to be modified or who will be paid less than the full value of their claims under the plan, vote on the plan by ballot. 11 U.S.C. § 1126. After the disclosure statement is approved by the court and the ballots are

collected and tallied, the court will conduct a confirmation hearing to determine whether to confirm the plan. 11 U.S.C. § 1128.

In the case of individuals, chapter 11 bears some similarities to chapter 13. For example, property of the estate for an individual debtor includes the debtor's earnings and property acquired by the debtor after filing until the case is closed, dismissed or converted; funding of the plan may be from the debtor's future earnings; and the plan cannot be confirmed over a creditor's objection without committing all of the debtor's disposable income over five years unless the plan pays the claim in full, with interest, over a shorter period of time. 11 U.S.C. §§ 1115, 1123(a)(8), 1129(a)(15).

### **The Chapter 11 Debtor in Possession**

Chapter 11 is typically used to reorganize a business, which may be a corporation, sole proprietorship, or partnership. A corporation exists separate and apart from its owners, the stockholders. The chapter 11 bankruptcy case of a corporation (corporation as debtor) does not put the personal assets of the stockholders at risk other than the value of their investment in the company's stock. A sole proprietorship (owner as debtor), on the other hand, does not have an identity separate and distinct from its owner(s). Accordingly, a bankruptcy case involving a sole proprietorship includes both the business and personal assets of the owners-debtors. Like a corporation, a partnership exists separate and apart from its partners. In a partnership bankruptcy case (partnership as debtor), however, the partners' personal assets may, in some cases, be used to pay

creditors in the bankruptcy case or the partners, themselves, may be forced to file for bankruptcy protection.

Section 1107 of the Bankruptcy Code places the debtor in possession in the position of a fiduciary, with the rights and powers of a chapter 11 trustee, and it requires the debtor to perform of all but the investigative functions and duties of a trustee. These duties, set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, include accounting for property, examining and objecting to claims, and filing informational reports as required by the court and the U.S. trustee or bankruptcy administrator (discussed below), such as monthly operating reports. 11 U.S.C. §§ 1106, 1107; Fed. R. Bankr. P. 2015(a). The debtor in possession also has many of the other powers and duties of a trustee, including the right, with the court's approval, to employ attorneys, accountants, appraisers, auctioneers, or other professional persons to assist the debtor during its bankruptcy case. Other responsibilities include filing tax returns and reports which are either necessary or ordered by the court after confirmation, such as a final accounting. The U.S. trustee is responsible for monitoring the compliance of the debtor in possession with the reporting requirements.

Railroad reorganizations have specific requirements under subsection IV of chapter 11, which will not be addressed here. In addition, stock and commodity brokers are prohibited from filing under chapter 11 and are restricted to chapter 7. 11 U.S.C. § 109(d).

## **The US Trustee or Bankruptcy Administrator**

The U.S. trustee plays a major role in monitoring the progress of a chapter 11 case and supervising its administration. The U.S. trustee is responsible for monitoring the debtor in possession's operation of the business and the submission of operating reports and fees. Additionally, the U.S. trustee monitors applications for compensation and reimbursement by professionals, plans and disclosure statements filed with the court, and creditors' committees. The U.S. trustee conducts a meeting of the creditors, often referred to as the "section 341 meeting," in a chapter 11 case. 11 U.S.C. § 341. The U.S. trustee and creditors may question the debtor under oath at the section 341 meeting concerning the debtor's acts, conduct, property, and the administration of the case.

The U.S. trustee also imposes certain requirements on the debtor in possession concerning matters such as reporting its monthly income and operating expenses, establishing new bank accounts, and paying current employee withholding and other taxes. By law, the debtor in possession must pay a quarterly fee to the U.S. trustee for each quarter of a year until the case is converted or dismissed. 28 U.S.C. § 1930(a)(6). The amount of the fee, which may range from \$250 to \$10,000, depends on the amount of the debtor's disbursements during each quarter. Should a debtor in possession fail to comply with the reporting requirements of the U.S. trustee or orders of the bankruptcy court, or fail to take the appropriate steps to bring the case to confirmation, the U.S. trustee may file a motion with the court to have the debtor's chapter 11 case converted to

another chapter of the Bankruptcy Code or to have the case dismissed.

In North Carolina and Alabama, bankruptcy administrators perform similar functions that U.S. trustees perform in the remaining forty-eight states. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the U.S. trustee program is administered by the Department of Justice. For purposes of this publication, references to U.S. trustees are also applicable to bankruptcy administrators.

## **Creditors' Committees**

Creditors' committees can play a major role in chapter 11 cases. The committee is appointed by the U.S. trustee and ordinarily consists of unsecured creditors who hold the seven largest unsecured claims against the debtor. 11 U.S.C. § 1102. Among other things, the committee: consults with the debtor in possession on administration of the case; investigates the debtor's conduct and operation of the business; and participates in formulating a plan. 11 U.S.C. § 1103. A creditors' committee may, with the court's approval, hire an attorney or other professionals to assist in the performance of the committee's duties. A creditors' committee can be an important safeguard to the proper management of the business by the debtor in possession.

## **The Small Business Case and the Small Business Debtor**

In some smaller cases the U.S. trustee may be unable to find creditors willing to serve on a creditors' committee, or the committee may not be actively involved

in the case. The Bankruptcy Code addresses this issue by treating a "small business case" somewhat differently than a regular bankruptcy case. A small business case is defined as a case with a "small business debtor." 11 U.S.C. § 101(51C). Determination of whether a debtor is a "small business debtor" requires application of a two-part test. First, the debtor must be engaged in commercial or business activities (other than primarily owning or operating real property) with total non-contingent liquidated secured and unsecured debts of \$2,190,000 or less. Second, the debtor's case must be one in which the U.S. trustee has not appointed a creditors' committee, or the court has determined the creditors' committee is insufficiently active and representative to provide oversight of the debtor. 11 U.S.C. § 101(51D).

In a small business case, the debtor in possession must, among other things, attach the most recently prepared balance sheet, statement of operations, cash-flow statement and most recently filed tax return to the petition or provide a statement under oath explaining the absence of such documents and must attend court and the U.S. trustee meeting through senior management personnel and counsel. The small business debtor must make ongoing filings with the court concerning its profitability and projected cash receipts and disbursements, and must report whether it is in compliance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure and whether it has paid its taxes and filed its tax returns. 11 U.S.C. §§ 308, 1116.

In contrast to other chapter 11 debtors, the small business debtor is subject to additional oversight by the U.S. trustee. Early in the case, the small business

debtor must attend an "initial interview" with the U.S. trustee at which time the U.S. trustee will evaluate the debtor's viability, inquire about the debtor's business plan, and explain certain debtor obligations including the debtor's responsibility to file various reports. 28 U.S.C. § 586(a)(7). The U.S. trustee will also monitor the activities of the small business debtor during the case to identify as promptly as possible whether the debtor will be unable to confirm a plan.

Because certain filing deadlines are different and extensions are more difficult to obtain, a case designated as a small business case normally proceeds more quickly than other chapter 11 cases. For example, only the debtor may file a plan during the first 180 days of a small business case. 11 U.S.C. § 1121(e). This "exclusivity period" may be extended by the court, but only to 300 days, and only if the debtor demonstrates by a preponderance of the evidence that the court will confirm a plan within a reasonable period of time. When the case is not a small business case, however, the court may extend the exclusivity period "for cause" up to 18 months.

### **The Single Asset Real Estate Debtor**

Single asset real estate debtors are subject to special provisions of the Bankruptcy Code. The term "single asset real estate" is defined as "a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property

and activities incidental." 11 U.S.C. § 101(51B). The Bankruptcy Code provides circumstances under which creditors of a single asset real estate debtor may obtain relief from the automatic stay which are not available to creditors in ordinary bankruptcy cases. 11 U.S.C. § 362(d). On request of a creditor with a claim secured by the single asset real estate and after notice and a hearing, the court will grant relief from the automatic stay to the creditor unless the debtor files a feasible plan of reorganization or begins making interest payments to the creditor within 90 days from the date of the filing of the case, or within 30 days of the court's determination that the case is a single asset real estate case. The interest payments must be equal to the non-default contract interest rate on the value of the creditor's interest in the real estate. 11 U.S.C. § 362(d)(3).

### **Appointment or Election of a Case Trustee**

Although the appointment of a case trustee is a rarity in a chapter 11 case, a party in interest or the U.S. trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a chapter 11 case. The court, on motion by a party in interest or the U.S. trustee and after notice and hearing, shall order the appointment of a case trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, or if such an appointment is in the interest of creditors, any equity security holders, and other interests of the estate. 11 U.S.C. § 1104(a). Moreover, the U.S. trustee is required to move for appointment of a trustee if there are reasonable grounds to believe that any of the parties in control

of the debtor "participated in actual fraud, dishonesty or criminal conduct in the management of the debtor or the debtor's financial reporting." 11 U.S.C. § 1104(e). The trustee is appointed by the U.S. trustee, after consultation with parties in interest and subject to the court's approval. Fed. R. Bankr. P. 2007.1. Alternatively, a trustee in a case may be elected if a party in interest requests the election of a trustee within 30 days after the court orders the appointment of a trustee. In that instance, the U.S. trustee convenes a meeting of creditors for the purpose of electing a person to serve as trustee in the case. 11 U.S.C. § 1104(b).

The case trustee is responsible for management of the property of the estate, operation of the debtor's business, and, if appropriate, the filing of a plan of reorganization. Section 1106 of the Bankruptcy Code requires the trustee to file a plan "as soon as practicable" or, alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed. 11 U.S.C. § 1106(a)(5).

Upon the request of a party in interest or the U.S. trustee, the court may terminate the trustee's appointment and restore the debtor in possession to management of bankruptcy estate at any time before confirmation. 11 U.S.C. § 1105.

### **The Role of an Examiner**

The appointment of an examiner in a chapter 11 case is rare. The role of an examiner is generally more limited than that of a trustee. The examiner is authorized to perform the investigatory functions of the trustee and is required to file a statement of any investigation

conducted. If ordered to do so by the court, however, an examiner may carry out any other duties of a trustee that the court orders the debtor in possession not to perform. 11 U.S.C. § 1106. Each court has the authority to determine the duties of an examiner in each particular case. In some cases, the examiner may file a plan of reorganization, negotiate or help the parties negotiate, or review the debtor's schedules to determine whether some of the claims are improperly categorized. Sometimes, the examiner may be directed to determine if objections to any proofs of claim should be filed or whether causes of action have sufficient merit so that further legal action should be taken. The examiner may not subsequently serve as a trustee in the case. 11 U.S.C. § 321.

### **The Automatic Stay**

The automatic stay provides a period of time in which all judgments, collection activities, foreclosures, and repossessions of property are suspended and may not be pursued by the creditors on any debt or claim that arose before the filing of the bankruptcy petition. As with cases under other chapters of the Bankruptcy Code, a stay of creditor actions against the chapter 11 debtor automatically goes into effect when the bankruptcy petition is filed. 11 U.S.C. § 362(a). The filing of a petition, however, does not operate as a stay for certain types of actions listed under 11 U.S.C. § 362(b). The stay provides a breathing spell for the debtor, during which negotiations can take place to try to resolve the difficulties in the debtor's financial situation.

Under specific circumstances, the secured creditor can obtain an order from the court granting relief from the automatic

stay. For example, when the debtor has no equity in the property and the property is not necessary for an effective reorganization, the secured creditor can seek an order of the court lifting the stay to permit the creditor to foreclose on the property, sell it, and apply the proceeds to the debt. 11 U.S.C. § 362(d).

The Bankruptcy Code permits applications for fees to be made by certain professionals during the case. Thus, a trustee, a debtor's attorney, or any professional person appointed by the court may apply to the court at intervals of 120 days for interim compensation and reimbursement payments. In very large cases with extensive legal work, the court may permit more frequent applications. Although professional fees may be paid if authorized by the court, the debtor cannot make payments to professional creditors on prepetition obligations, i.e., obligations which arose before the filing of the bankruptcy petition. The ordinary expenses of the ongoing business, however, continue to be paid.

### **Who Can File a Plan**

The debtor (unless a "small business debtor") has a 120-day period during which it has an exclusive right to file a plan. 11 U.S.C. § 1121(b). This exclusivity period may be extended or reduced by the court. But in no event may the exclusivity period, including all extensions, be longer than 18 months. 11 U.S.C. § 1121(d). After the exclusivity period has expired, a creditor or the case trustee may file a competing plan. The U.S. trustee may not file a plan. 11 U.S.C. § 307.

A chapter 11 case may continue for many years unless the court, the U.S. trustee,



the committee, or another party in interest acts to ensure the case's timely resolution. The creditors' right to file a competing plan provides incentive for the debtor to file a plan within the exclusivity period and acts as a check on excessive delay in the case.

### **Avoidable Transfers**

The debtor in possession or the trustee, as the case may be, has what are called "avoiding" powers. These powers may be used to undo a transfer of money or property made during a certain period of time before the filing of the bankruptcy petition. By avoiding a particular transfer of property, the debtor in possession can cancel the transaction and force the return or "disgorgement" of the payments or property, which then are available to pay all creditors. Generally, and subject to various defenses, the power to avoid transfers is effective against transfers made by the debtor within 90 days before filing the petition. But transfers to "insiders" (i.e., relatives, general partners, and directors or officers of the debtor) made up to a year before filing may be avoided. 11 U.S.C. §§ 101(31), 101(54), 547, 548. In addition, under 11 U.S.C. § 544, the trustee is authorized to avoid transfers under applicable state law, which often provides for longer time periods. Avoiding powers prevent unfair prepetition payments to one creditor at the expense of all other creditors.

### **Cash Collateral, Adequate Protection and Operating Capital**

Although the preparation, confirmation, and implementation of a plan of reorganization is at the heart of a chapter

11 case, other issues may arise that must be addressed by the debtor in possession. The debtor in possession may use, sell, or lease property of the estate in the ordinary course of its business, without prior approval, unless the court orders otherwise. 11 U.S.C. § 363(c). If the intended sale or use is outside the ordinary course of its business, the debtor must obtain permission from the court.

A debtor in possession may not use "cash collateral" without the consent of the secured party or authorization by the court, which must first examine whether the interest of the secured party is adequately protected. 11 U.S.C. § 363. Section 363 defines "cash collateral" as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, whenever acquired, in which the estate and an entity other than the estate have an interest. It includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a creditor's security interest.

When "cash collateral" is used (spent), the secured creditors are entitled to receive additional protection under section 363 of the Bankruptcy Code. The debtor in possession must file a motion requesting an order from the court authorizing the use of the cash collateral. Pending consent of the secured creditor or court authorization for the debtor in possession's use of cash collateral, the debtor in possession must segregate and account for all cash collateral in its possession. 11 U.S.C. § 363(c)(4). A party with an interest in property being used by the debtor may request that the court

prohibit or condition this use to the extent necessary to provide "adequate protection" to the creditor.

Adequate protection may be required to protect the value of the creditor's interest in the property being used by the debtor in possession. This is especially important when there is a decrease in value of the property. The debtor may make periodic or lump sum cash payments, or provide an additional or replacement lien that will result in the creditor's property interest being adequately protected. 11 U.S.C. § 361.

When a chapter 11 debtor needs operating capital, it may be able to obtain it from a lender by giving the lender a court-approved "superpriority" over other unsecured creditors or a lien on property of the estate. 11 U.S.C. § 364.

## **Motions**

Before confirmation of a plan, several activities may take place in a chapter 11 case. Continued operation of the debtor's business may lead to the filing of a number of contested motions. The most common are those seeking relief from the automatic stay, the use of cash collateral, or to obtain credit. There may also be litigation over executory (i.e., unfulfilled) contracts and unexpired leases and the assumption or rejection of those executory contracts and unexpired leases by the debtor in possession. 11 U.S.C. § 365. Delays in formulating, filing, and obtaining confirmation of a plan often prompt creditors to file motions for relief from stay, to convert the case to chapter 7, or to dismiss the case altogether.

## **Adversary Proceedings**

Frequently, the debtor in possession will institute a lawsuit, known as an adversary proceeding, to recover money or property for the estate. Adversary proceedings may take the form of lien avoidance actions, actions to avoid preferences, actions to avoid fraudulent transfers, or actions to avoid post-petition transfers. These proceedings are governed by Part VII of the Federal Rules of Bankruptcy Procedure. At times, a creditors' committee may be authorized by the bankruptcy court to pursue these actions against insiders of the debtor if the plan provides for the committee to do so or if the debtor has refused a demand to do so. Creditors may also initiate adversary proceedings by filing complaints to determine the validity or priority of a lien, revoke an order confirming a plan, determine the dischargeability of a debt, obtain an injunction, or subordinate a claim of another creditor.

## **Claims**

The Bankruptcy Code defines a claim as: (1) a right to payment; (2) or a right to an equitable remedy for a failure of performance if the breach gives rise to a right to payment. 11 U.S.C. § 101(5). Generally, any creditor whose claim is not scheduled (i.e., listed by the debtor on the debtor's schedules) or is scheduled as disputed, contingent, or unliquidated must file a proof of claim (and attach evidence documenting the claim) in order to be treated as a creditor for purposes of voting on the plan and distribution under it. Fed. R. Bankr. P. 3003(c)(2). But filing a proof of claim is not necessary if the creditor's claim is scheduled (but is not listed as disputed, contingent, or

unliquidated by the debtor) because the debtor's schedules are deemed to constitute evidence of the validity and amount of those claims. 11 U.S.C. § 1111. If a scheduled creditor chooses to file a claim, a properly filed proof of claim supersedes any scheduling of that claim. Fed. R. Bankr. P. 3003(c)(4). It is the responsibility of the creditor to determine whether the claim is accurately listed on the debtor's schedules. The debtor must provide notification to those creditors whose names are added and whose claims are listed as a result of an amendment to the schedules. The notification also should advise such creditors of their right to file proofs of claim and that their failure to do so may prevent them from voting upon the debtor's plan of reorganization or participating in any distribution under that plan. When a debtor amends the schedule of liabilities to add a creditor or change the status of any claims to disputed, contingent, or unliquidated, the debtor must provide notice of the amendment to any entity affected. Fed. R. Bankr. P. 1009(a).

### **Equity Security Holders**

An equity security holder is a holder of an equity security of the debtor. Examples of an equity security are a share in a corporation, an interest of a limited partner in a limited partnership, or a right to purchase, sell, or subscribe to a share, security, or interest of a share in a corporation or an interest in a limited partnership. 11 U.S.C. § 101(16), (17). An equity security holder may vote on the plan of reorganization and may file a proof of interest, rather than a proof of claim. A proof of interest is deemed filed for any interest that appears in the

debtor's schedules, unless it is scheduled as disputed, contingent, or unliquidated. 11 U.S.C. § 1111. An equity security holder whose interest is not scheduled or is scheduled as disputed, contingent, or unliquidated must file a proof of interest in order to be treated as a creditor for purposes of voting on the plan and distribution under it. Fed. R. Bankr. P. 3003(c)(2). A properly filed proof of interest supersedes any scheduling of that interest. Fed. R. Bankr. P. 3003(c)(4). Generally, most of the provisions that apply to proofs of claim, as discussed above, are also applicable to proofs of interest.

### **Conversion or Dismissal**

A debtor in a case under chapter 11 has a one-time absolute right to convert the chapter 11 case to a case under chapter 7 unless: (1) the debtor is not a debtor in possession; (2) the case originally was commenced as an involuntary case under chapter 11; or (3) the case was converted to a case under chapter 11 other than at the debtor's request. 11 U.S.C. § 1112(a). A debtor in a chapter 11 case does not have an absolute right to have the case dismissed upon request.

A party in interest may file a motion to dismiss or convert a chapter 11 case to a chapter 7 case "for cause." Generally, if cause is established after notice and hearing, the court must convert or dismiss the case (whichever is in the best interests of creditors and the estate) unless it specifically finds that the requested conversion or dismissal is not in the best interest of creditors and the estate. 11 U.S.C. § 1112(b). Alternatively, the court may decide that appointment of a chapter 11 trustee or an examiner is in

the best interests of creditors and the estate. 11 U.S.C. § 1104(a)(3). Section 1112(b)(4) of the Bankruptcy Code sets forth numerous examples of cause that would support dismissal or conversion. For example, the moving party may establish cause by showing that there is substantial or continuing loss to the estate and the absence of a reasonable likelihood of rehabilitation; gross mismanagement of the estate; failure to maintain insurance that poses a risk to the estate or the public; or unauthorized use of cash collateral that is substantially harmful to a creditor.

Cause for dismissal or conversion also includes an unexcused failure to timely compliance with reporting and filing requirements; failure to attend the meeting of creditors or attend an examination without good cause; failure to timely provide information to the U.S. trustee; and failure to timely pay post-petition taxes or timely file post-petition returns Fed. R. Bankr. P. 2004.

Additionally, failure to file a disclosure statement or to file and confirm a plan within the time fixed by the Bankruptcy Code or order of the court; inability to effectuate a plan; denial or revocation of confirmation; inability to consummate a confirmed plan represent "cause" for dismissal under the statute. In an individual case, failure of the debtor to pay post-petition domestic support obligations constitutes "cause" for dismissal or conversion.

Section 1112(c) of the Bankruptcy Code provides an important exception to the conversion process in a chapter 11 case. Under this provision, the court is prohibited from converting a case involving a farmer or charitable institution to a liquidation case under

chapter 7 unless the debtor requests the conversion.

### **The Disclosure Statement**

Generally, the debtor (or any plan proponent) must file and get court approval of a written disclosure statement before there can be a vote on the plan of reorganization. The disclosure statement must provide "adequate information" concerning the affairs of the debtor to enable the holder of a claim or interest to make an informed judgment about the plan. 11 U.S.C. § 1125. In a small business case, however, the court may determine that the plan itself contains adequate information and that a separate disclosure statement is unnecessary. 11 U.S.C. § 1125(f). After the disclosure statement is filed, the court must hold a hearing to determine whether the disclosure statement should be approved. Acceptance or rejection of a plan usually cannot be solicited until the court has first approved the written disclosure statement. 11 U.S.C. § 1125(b). An exception to this rule exists if the initial solicitation of the party occurred before the bankruptcy filing, as would be the case in so-called "prepackaged" bankruptcy plans (i.e., where the debtor negotiates a plan with significant creditor constituencies before filing for bankruptcy). Continued post-filing solicitation of such parties is not prohibited. After the court approves the disclosure statement, the debtor or proponent of a plan can begin to solicit acceptances of the plan, and creditors may also solicit rejections of the plan.

Upon approval of a disclosure statement, the plan proponent must mail the following to the U.S. trustee and all

creditors and equity security holders: (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of the plan may be filed; and (4) such other information as the court may direct, including any opinion of the court approving the disclosure statement or a court-approved summary of the opinion. Fed. R. Bankr. P. 3017(d). In addition, the debtor must mail to the creditors and equity security holders entitled to vote on the plan or plans: (1) notice of the time fixed for filing objections; (2) notice of the date and time for the hearing on confirmation of the plan; and (3) a ballot for accepting or rejecting the plan and, if appropriate, a designation for the creditors to identify their preference among competing plans. *Id.* But in a small business case, the court may conditionally approve a disclosure statement subject to final approval after notice and a combined disclosure statement/plan confirmation hearing. 11 U.S.C. § 1125(f).

### **Acceptance of the Plan of Reorganization**

As noted earlier, only the debtor may file a plan of reorganization during the first 120-day period after the petition is filed (or after entry of the order for relief, if an involuntary petition was filed). The court may grant extension of this exclusive period up to 18 months after the petition date. In addition, the debtor has 180 days after the petition date or entry of the order for relief to obtain acceptances of its plan. 11 U.S.C. § 1121. The court may extend (up to 20 months) or reduce this acceptance exclusive period for cause. 11 U.S.C. § 1121(d). In practice, debtors

typically seek extensions of both the plan filing and plan acceptance deadlines at the same time so that any order sought from the court allows the debtor two months to seek acceptances after filing a plan before any competing plan can be filed.

If the exclusive period expires before the debtor has filed and obtained acceptance of a plan, other parties in interest in a case, such as the creditors' committee or a creditor, may file a plan. Such a plan may compete with a plan filed by another party in interest or by the debtor. If a trustee is appointed, the trustee must file a plan, a report explaining why the trustee will not file a plan, or a recommendation for conversion or dismissal of the case. 11 U.S.C. § 1106(a)(5). A proponent of a plan is subject to the same requirements as the debtor with respect to disclosure and solicitation.

In a chapter 11 case, a liquidating plan is permissible. Such a plan often allows the debtor in possession to liquidate the business under more economically advantageous circumstances than a chapter 7 liquidation. It also permits the creditors to take a more active role in fashioning the liquidation of the assets and the distribution of the proceeds than in a chapter 7 case.

Section 1123(a) of the Bankruptcy Code lists the mandatory provisions of a chapter 11 plan, and section 1123(b) lists the discretionary provisions. Section 1123(a)(1) provides that a chapter 11 plan must designate classes of claims and interests for treatment under the reorganization. Generally, a plan will classify claim holders as secured creditors, unsecured creditors entitled to

priority, general unsecured creditors, and equity security holders.

Under section 1126(c) of the Bankruptcy Code, an entire class of claims is deemed to accept a plan if the plan is accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims in the class. Under section 1129(a)(10), if there are impaired classes of claims, the court cannot confirm a plan unless it has been accepted by at least one class of non-insiders who hold impaired claims (i.e., claims that are not going to be paid completely or in which some legal, equitable, or contractual right is altered). Moreover, under section 1126(f), holders of unimpaired claims are deemed to have accepted the plan.

Under section 1127(a) of the Bankruptcy Code, the plan proponent may modify the plan at any time before confirmation, but the plan as modified must meet all the requirements of chapter 11. When there is a proposed modification after balloting has been conducted, and the court finds after a hearing that the proposed modification does not adversely affect the treatment of any creditor who has not accepted the modification in writing, the modification is deemed to have been accepted by all creditors who previously accepted the plan. Fed. R. Bankr. P. 3019. If it is determined that the proposed modification does have an adverse effect on the claims of non-consenting creditors, then another balloting must take place.

Because more than one plan may be submitted to the creditors for approval, every proposed plan and modification must be dated and identified with the name of the entity or entities submitting the plan or modification. Fed. R. Bankr. P. 3016(b). When competing plans are

presented that meet the requirements for confirmation, the court must consider the preferences of the creditors and equity security holders in determining which plan to confirm.

Any party in interest may file an objection to confirmation of a plan. The Bankruptcy Code requires the court, after notice, to hold a hearing on confirmation of a plan. If no objection to confirmation has been timely filed, the Bankruptcy Code allows the court to determine whether the plan has been proposed in good faith and according to law. Fed. R. Bankr. P. 3020(b)(2). Before confirmation can be granted, the court must be satisfied that there has been compliance with all the other requirements of confirmation set forth in section 1129 of the Bankruptcy Code, even in the absence of any objections. In order to confirm the plan, the court must find, among other things, that: (1) the plan is feasible; (2) it is proposed in good faith; and (3) the plan and the proponent of the plan are in compliance with the Bankruptcy Code. In order to satisfy the feasibility requirement, the court must find that confirmation of the plan is not likely to be followed by liquidation (unless the plan is a liquidating plan) or the need for further financial reorganization.

## **The Discharge**

Section 1141(d)(1) generally provides that confirmation of a plan discharges a debtor from any debt that arose before the date of confirmation. After the plan is confirmed, the debtor is required to make plan payments and is bound by the provisions of the plan of reorganization. The confirmed plan creates new

contractual rights, replacing or superseding pre-bankruptcy contracts.

There are, of course, exceptions to the general rule that an order confirming a plan operates as a discharge.

Confirmation of a plan of reorganization discharges any type of debtor – corporation, partnership, or individual – from most types of prepetition debts. It does not, however, discharge an individual debtor from any debt made nondischargeable by section 523 of the Bankruptcy Code.<sup>1</sup> Moreover, except in limited circumstances, a discharge is not available to an individual debtor unless and until all payments have been made under the plan. 11 U.S.C. § 1141(d)(5). Confirmation does not discharge the debtor if the plan is a liquidation plan, as opposed to one of reorganization, unless the debtor is an individual. When the debtor is an individual, confirmation of a liquidation plan will result in a discharge (after plan payments are made) unless grounds would exist for denying the debtor a discharge if the case were

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<sup>1</sup> Debts not discharged include debts for alimony and child support, certain taxes, debts for certain educational benefit overpayments or loans made or guaranteed by a governmental unit, debts for willful and malicious injury by the debtor to another entity or to the property of another entity, debts for death or personal injury caused by the debtor's operation of a motor vehicle while the debtor was intoxicated from alcohol or other substances, and debts for certain criminal restitution orders. 11 U.S.C. § 523(a). The debtor will continue to be liable for these types of debts to the extent that they are not paid in the chapter 11 case. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, and debts for willful and malicious injury by the debtor to another entity or to the property of another entity will be discharged unless a creditor timely files and prevails in an action to have such debts declared nondischargeable. 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c).

proceeding under chapter 7 instead of chapter 11. 11 U.S.C. §§ 727(a), 1141(d).

### **Postconfirmation Modification of the Plan**

At any time after confirmation and before "substantial consummation" of a plan, the proponent of a plan may modify the plan if the modified plan would meet certain Bankruptcy Code requirements. 11 U.S.C. § 1127(b). This should be distinguished from preconfirmation modification of the plan. A modified postconfirmation plan does not automatically become the plan. A modified postconfirmation plan in a chapter 11 case becomes the plan only "if circumstances warrant such modification" and the court, after notice and hearing, confirms the plan as modified. If the debtor is an individual, the plan may be modified postconfirmation upon the request of the debtor, the trustee, the U.S. trustee, or the holder of an allowed unsecured claim to make adjustments to payments due under the plan. 11 U.S.C. § 1127(e).

### **Postconfirmation Administration**

Notwithstanding the entry of the confirmation order, the court has the authority to issue any other order necessary to administer the estate. Fed. R. Bankr. P. 3020(d). This authority would include the postconfirmation determination of objections to claims or adversary proceedings, which must be resolved before a plan can be fully consummated. Sections 1106(a)(7) and 1107(a) of the Bankruptcy Code require a debtor in possession or a trustee to report on the progress made in implementing a plan after confirmation. A chapter 11

trustee or debtor in possession has a number of responsibilities to perform after confirmation, including consummating the plan, reporting on the status of consummation, and applying for a final decree.

### **Revocation of Confirmation Order**

Revocation of the confirmation order is an undoing or cancellation of the confirmation of a plan. A request for revocation of confirmation, if made at all, must be made by a party in interest within 180 days of confirmation. The court, after notice and hearing, may

revoke a confirmation order "if and only if the [confirmation] order was procured by fraud." 11 U.S.C. § 1144.

### **The Final Decree**

A final decree closing the case must be entered after the estate has been "fully administered." Fed. R. Bankr. P. 3022. Local bankruptcy court policies generally determine when the final decree is entered and the case closed.



## Chapter 12: Family Farmer or Family Fisherman Bankruptcy

*The chapter of the Bankruptcy Code providing for adjustment of debts of a "family farmer," or a "family fisherman" as those terms are defined in the Bankruptcy Code.*

### Background

Chapter 12 is designed for "family farmers" or "family fishermen" with "regular annual income." It enables financially distressed family farmers and fishermen to propose and carry out a plan to repay all or part of their debts. Under chapter 12, debtors propose a repayment plan to make installments to creditors over three to five years. Generally, the plan must provide for payments over three years unless the court approves a longer period "for cause." But unless the plan proposes to pay 100% of domestic support claims (i.e., child support and alimony) if any exist, it must be for five years and must include all of the debtor's disposable income. In no case may a plan provide for payments over a period longer than five years. 11 U.S.C. § 1222(b)-(c).

In tailoring bankruptcy law to meet the economic realities of family farming and the family fisherman, chapter 12 eliminates many of the barriers such debtors would face if seeking to reorganize under either chapter 11 or 13 of the Bankruptcy Code. For example, chapter 12 is more streamlined, less complicated, and less expensive than chapter 11, which is better suited to large corporate reorganizations. In addition, few family farmers or fishermen find chapter 13 to be advantageous because it is designed for wage earners who have

smaller debts than those facing family farmers. In chapter 12, Congress sought to combine the features of the Bankruptcy Code which can provide a framework for successful family farmer and fisherman reorganizations.

The Bankruptcy Code provides that only a family farmer or family fisherman with "regular annual income" may file a petition for relief under chapter 12. 11 U.S.C. §§ 101(18), 101(19A), 109(f). The purpose of this requirement is to ensure that the debtor's annual income is sufficiently stable and regular to permit the debtor to make payments under a chapter 12 plan. But chapter 12 makes allowance for situations in which family farmers or fishermen have income that is seasonal in nature. Relief under chapter 12 is voluntary, and only the debtor may file a petition under the chapter.

Under the Bankruptcy Code, "family farmers" and "family fishermen" fall into two categories: (1) an individual or individual and spouse and (2) a corporation or partnership. Farmers or fishermen falling into the first category must meet each of the following four criteria as of the date the petition is filed in order to qualify for relief under chapter 12:

- The individual or husband and wife must be engaged in a farming operation or a commercial fishing operation.
- The total debts (secured and unsecured) of the operation must not exceed \$3,792,650 (if a farming operation) or \$1,757,475 (if a commercial fishing operation).
- If a family farmer, at least 50%, and if family fisherman at least

80%, of the total debts that are fixed in amount (exclusive of debt for the debtor's home) must be related to the farming or commercial fishing operation.

- More than 50% of the gross income of the individual or the husband and wife for the preceding tax year (or, for family farmers only, for each of the 2nd and 3rd prior tax years) must have come from the farming or commercial fishing operation.

In order for a corporation or partnership to fall within the second category of debtors eligible to file as family farmers or family fishermen, the corporation or partnership must meet each of the following criteria as of the date of the filing of the petition:

- More than one-half the outstanding stock or equity in the corporation or partnership must be owned by one family or by one family and its relatives.
- The family or the family and its relatives must conduct the farming or commercial fishing operation.
- More than 80% of the value of the corporate or partnership assets must be related to the farming or fishing operation.
- The total indebtedness of the corporation or partnership must not exceed \$3,792,650 (if a farming operation) or \$1,757,475 (if a commercial fishing operation).
- At least 50% for a farming operation or 80% for a fishing operation of the corporation's or

partnership's total debts which are fixed in amount (exclusive of debt for one home occupied by a shareholder) must be related to the farming or fishing operation.

- If the corporation issues stock, the stock cannot be publicly traded.

A debtor cannot file under chapter 12 (or any other chapter) if during the preceding 180 days a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e). In addition, no individual may be a debtor under chapter 12 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator)<sup>1</sup> has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

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<sup>1</sup> In North Carolina and Alabama, bankruptcy administrators perform similar functions that U.S. trustees perform in the remaining forty-eight states. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the U.S. trustee program is administered by the Department of Justice. For purposes of this publication, references to U.S. trustees are also applicable to bankruptcy administrators.

## How Chapter 12 Works

A chapter 12 case begins by filing a petition with the bankruptcy court serving the area where the individual lives or where the corporation or partnership debtor has its principal place of business or principal assets. Unless the court orders otherwise, the debtor also shall file with the court (1) schedules of assets and liabilities, (2) a schedule of current income and expenditures, (3) a schedule of executory contracts and unexpired leases, and (4) a statement of financial affairs. Fed. R. Bankr. P. 1007(b). A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (The Official Forms may be purchased at legal stationery stores or downloaded from the Internet at [www.uscourts.gov/bkforms/index.html](http://www.uscourts.gov/bkforms/index.html). They are also available from the court.)

As of October 17, 2005, the courts must charge a \$200 case filing fee and a \$39 miscellaneous administrative fee. Normally the fees should be paid to the clerk of the court upon filing. With the court's permission, however, they may be paid in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. The number of such installments is limited to four and the debtor must make the final installment no later than 120 days after filing the petition. Fed. R. Bankr. P. 1006(b). For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after the filing of the petition. *Id.* The debtor may also pay the \$39 administrative fee in installments. If a joint petition is filed, only one filing fee and one administrative fee are charged. Debtors should be aware that failure to

pay these fees may result in dismissal of the case. 11 U.S.C. § 1208(c)(2).

In order to complete the Official Bankruptcy Forms which make up the petition, statement of financial affairs, and schedules, the debtor will need to compile the following information:

- A list of all creditors and the amounts and nature of their claims;
- The source, amount, and frequency of the debtor's income;
- A list of all of the debtor's property; and
- A detailed list of the debtor's monthly farming and living expenses, i.e., food, shelter, utilities, taxes, transportation, medicine, feed, fertilizer, etc.

Married individuals must gather this information for each spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only one spouse is filing. In a situation where only one spouse files, the income and expenses of the non-filing spouse are required so that the court, the trustee, and the creditors can evaluate the household's financial position.

When a chapter 12 petition is filed, an impartial trustee is appointed to administer the case. 11 U.S.C. § 1202. In some districts, the U.S. trustee appoints a standing trustee to serve in all chapter 12 cases. 28 U.S.C. § 586(b). As in chapter 13, the trustee both evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors. 11 U.S.C. § 1202.

Filing the petition under chapter 12 "automatically stays" (stops) most

collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. Filing the petition does not, however, stay certain types of actions listed under 11 U.S.C. § 362(b). Under certain circumstances, the stay may be limited, or may not take effect at all. 11 U.S.C. § 362(c). The stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally cannot initiate or continue any lawsuits, wage garnishments, or even telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Chapter 12 also contains a special automatic stay provision that protects co-debtors. Unless the bankruptcy court authorizes otherwise, a creditor may not seek to collect a "consumer debt" from any individual who is liable with the debtor. 11 U.S.C. § 1201(a). Consumer debts are those incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. § 101(8).

Between 20 to 35 days after the petition is filed, the chapter 12 trustee will hold a "meeting of creditors." If the U.S. trustee or bankruptcy administrator schedules the meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the debtor files. During the meeting the trustee puts the debtor under oath and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding the debtor's financial affairs and the proposed terms of the debtor's repayment plan. 11 U.S.C. § 343; Fed. R. Bankr. P. 4002. If a husband and wife

have filed a joint petition, they both must attend the creditors' meeting. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending. 11 U.S.C. § 341(c). The parties typically resolve problems with the plan either during or shortly after the creditors' meeting. Generally, the debtor can avoid problems by making sure that the petition and plan are complete and accurate, and by consulting with the trustee prior to the meeting.

In a chapter 12 case, to participate in distributions from the bankruptcy estate, unsecured creditors must file their claims with the court within 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c). A governmental unit, however, has 180 days from the date the case is filed file a proof of claim. 11 U.S.C. § 502(b)(9).

After the meeting of creditors, the debtor, the chapter 12 trustee, and interested creditors will attend a hearing on confirmation of the debtor's chapter 12 repayment plan.

### **The Chapter 12 Plan and Confirmation Hearing**

Unless the court grants an extension, the debtor must file a plan of repayment with the petition or within 90 days after filing the petition. 11 U.S.C. § 1221. The plan, which must be submitted to the court for approval, provides for payments of fixed amounts to the trustee on a regular basis. The trustee then distributes the funds to creditors according to the terms of the plan, which typically offers creditors less than full payment on their claims.

There are three types of claims: priority, secured, and unsecured. Priority claims

are those granted special status by the bankruptcy law, such as most taxes and the costs of bankruptcy proceeding.<sup>2</sup> Secured claims are those for which the creditor has the right to liquidate certain property if the debtor does not pay the underlying debt. In contrast to secured claims, unsecured claims are generally those for which the creditor has no special rights to collect against particular property owned by the debtor.

A chapter 12 plan usually lasts three to five years. It must provide for full payment of all priority claims, unless a priority creditor agrees to different treatment of the claim or, in the case of a domestic support obligation, unless the debtor contributes all "disposable income" - discussed below - to a five-year plan. 11 U.S.C. § 1222(a)(2), (4).

Secured creditors must be paid at least as much as the value of the collateral pledged for the debt. One of the features of Chapter 12 is that payments to secured creditors can sometimes continue longer than the three-to-five-year period of the plan. For example, if the debtor's underlying debt obligation was scheduled to be paid over more than five years (i.e., an equipment loan or a mortgage), the debtor may be able to pay the loan off over the original loan repayment schedule as long as any arrearage is made up during the plan.

The plan does not have to pay unsecured claims in full, as long as it commits all of the debtor's projected "disposable income" (or property of equivalent value) to plan payments over a 3 to 5 year period, and as long as the unsecured

creditors are to receive at least as much as they would receive if the debtor's nonexempt assets were liquidated under chapter 7. 11 U.S.C. § 1225. "Disposable income" is defined as income not reasonably necessary for the maintenance or support of the debtor or dependents or for making payments needed to continue, preserve, and operate the debtor's business. 11 U.S.C. § 1225(b)(2).

Within 45 days after filing the plan, the presiding bankruptcy judge decides at a "confirmation hearing" whether the plan is feasible and meets the standards for confirmation under the Bankruptcy Code. 11 U.S.C. §§ 1224, 1225. Creditors, who receive 20 days' notice, may appear at the hearing and object to confirmation. Fed. R. Bankr. P. 2002(a)(8). While a variety of objections may be made, the typical arguments are that payments offered under the plan are less than creditors would receive if the debtor's assets were liquidated, or that the plan does not commit all of the debtor's disposable income for the three-to-five-year period of the plan.

If the court confirms the plan, the chapter 12 trustee will distribute funds received in accordance with the terms of the plan. 11 U.S.C. § 1226(a). If the court does not confirm the plan, the debtor may file a modified plan. 11 U.S.C. § 1223. The debtor may also convert the case to a liquidation under chapter 7.<sup>3</sup> 11 U.S.C. § 1208(a). If the debtor fails to confirm a plan and the case is dismissed, the court may authorize the trustee to keep some of the funds for costs, but the trustee must return all remaining funds to the debtor (other than funds already disbursed to creditors). 11 U.S.C. § 1226(a).

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<sup>2</sup> Section 507 sets forth 10 categories of unsecured claims which Congress has, for public policy reasons, given priority of distribution over other unsecured claims

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<sup>3</sup> A fee of \$25 is charged for converting a case under chapter 12 to a case under chapter 7.

On occasion, changed circumstances will affect the debtor's ability to make plan payments. A creditor may object or threaten to object to a plan, or the debtor may inadvertently have failed to list all creditors. In such instances, the plan may be modified either before or after confirmation. 11 U.S.C. §§ 1223, 1229. Modification after confirmation is not limited to an initiative by the debtor, but may also be made at the request of the trustee or an unsecured creditor. 11 U.S.C. § 1229(a).

### **Making the Plan Work**

The provisions of a confirmed plan bind the debtor and each creditor. 11 U.S.C. § 1227. Once the court confirms the plan, the debtor must make the plan succeed. The debtor must make regular payments to the trustee, which will require adjustment to living on a fixed budget for a prolonged period. Furthermore, while confirmation of the plan entitles the debtor to retain property as long as payments are made, the debtor may not incur any significant new debt without consulting the trustee, because additional debt may compromise the debtor's ability to complete the plan. 11 U.S.C. §§ 1222(a)(1), 1227. In any event, failure to make the plan payments may result in dismissal of the case. 11 U.S.C. § 1208(c). In addition, the court may dismiss the case or convert the case to a liquidation case under chapter 7 of the Bankruptcy Code upon a showing that the debtor has committed fraud in connection with the case. 11 U.S.C. § 1208(d).

### **The Chapter 12 Discharge**

The court may grant a "hardship discharge" to a chapter 12 debtor even though the debtor has failed to complete plan payments. 11 U.S.C. § 1228(b). Generally, a hardship discharge is available only to a debtor whose failure to complete plan payments is due to circumstances beyond the debtor's control and through no fault of the debtor. Creditors must have received at least as much as they would have received in a chapter 7 liquidation case, and the debtor must be unable to modify the plan. For example, injury or illness that precludes employment sufficient to fund even a modified plan may serve as the basis for a hardship discharge. The hardship discharge does not apply to any debts that are nondischargeable in a chapter 7 case. 11 U.S.C. § 523.

## **Chapter 13:**

### **Individual Debt Adjustment**

*The chapter of the Bankruptcy Code providing for adjustment of debts of an individual with regular income. (Chapter 13 allows a debtor to keep property and pay debts over time, usually three to five years.)*

#### **Background**

A chapter 13 bankruptcy is also called a wage earner's plan. It enables individuals with regular income to develop a plan to repay all or part of their debts. Under this chapter, debtors propose a repayment plan to make installments to creditors over three to five years. If the debtor's current monthly income is less than the applicable state median, the plan will be for three years unless the court approves a longer period "for cause."<sup>1</sup> If the debtor's current monthly income is greater than the applicable state median, the plan generally must be for five years. In no case may a plan provide for payments over a period longer than five years. 11 U.S.C. §1322(d). During this time the law forbids creditors from starting or continuing collection efforts.

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<sup>1</sup> The "current monthly income" received by the debtor is a defined term in the Bankruptcy Code and means the average monthly income received over the six calendar months before commencement of the bankruptcy case, including regular contributions to household expenses from nondebtors and including income from the debtor's spouse if the petition is a joint petition, but not including social security income or certain payments made because the debtor is the victim of certain crimes. 11 U.S.C. § 101(10A).

This chapter discusses six aspects of a chapter 13 proceeding: the advantages of choosing chapter 13, the chapter 13 eligibility requirements, how a chapter 13 proceeding works, making the plan work, and the special chapter 13 discharge.

#### **Advantages of Chapter 13**

Chapter 13 offers individuals a number of advantages over liquidation under chapter 7. Perhaps most significantly, chapter 13 offers individuals an opportunity to save their homes from foreclosure. By filing under this chapter, individuals can stop foreclosure proceedings and may cure delinquent mortgage payments over time. Nevertheless, they must still make all mortgage payments that come due during the chapter 13 plan on time. Another advantage of chapter 13 is that it allows individuals to reschedule secured debts (other than a mortgage for their primary residence) and extend them over the life of the chapter 13 plan. Doing this may lower the payments. Chapter 13 also has a special provision that protects third parties who are liable with the debtor on "consumer debts." This provision may protect co-signers. Finally, chapter 13 acts like a consolidation loan under which the individual makes the plan payments to a chapter 13 trustee who then distributes payments to creditors. Individuals will have no direct contact with creditors while under chapter 13 protection.

#### **Chapter 13 Eligibility**

Any individual, even if self-employed or operating an unincorporated business, is eligible for chapter 13 relief as long as the

individual's unsecured debts are less than \$360,475 and secured debts are less than \$1,081,400. 11 U.S.C. § 109(e).<sup>2</sup> These amounts are adjusted periodically to reflect changes in the consumer price index. A corporation or partnership may not be a chapter 13 debtor. *Id.*

An individual cannot file under chapter 13 or any other chapter if, during the preceding 180 days, a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e).

In addition, no individual may be a debtor under chapter 13 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

## **How Chapter 13 Works**

A chapter 13 case begins by filing a petition with the bankruptcy court

serving the area where the debtor has a domicile or residence. Unless the court orders otherwise, the debtor must also file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement of financial affairs. Fed. R. Bankr. P. 1007(b).

The debtor must also file a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. 11 U.S.C. § 521.

The debtor must provide the chapter 13 case trustee with a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case (including tax returns for prior years that had not been filed when the case began). *Id.* A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (The Official Forms may be purchased at legal stationery stores or downloaded from the Internet at [www.uscourts.gov/bkforms/index.html](http://www.uscourts.gov/bkforms/index.html). They are also available from the court.)

The courts must charge a \$235 case filing fee and a \$39 miscellaneous administrative fee. Normally the fees must be paid to the clerk of the court upon filing. With the court's permission, however, they may be paid in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. The number of installments is limited to four, and the debtor must make the final

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<sup>2</sup> These dollar amounts are effective for cases filed after April 1, 2010.



installment no later than 120 days after filing the petition. Fed. R. Bankr. P. 1006(b); see also, Local Rule 1006-1, 1006-2. For cause shown, the court may extend the time of any installment, as long as the last installment is paid no later than 180 days after filing the petition. *Id.* The debtor may also pay the \$39 administrative fee in installments. If a joint petition is filed, only one filing fee and one administrative fee are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 1307(c)(2).

In order to complete the Official Bankruptcy Forms that make up the petition, statement of financial affairs, and schedules, the debtor must compile the following information:

- A list of all creditors and the amounts and nature of their claims;
- The source, amount, and frequency of the debtor's income;
- A list of all of the debtor's property; and
- A detailed list of the debtor's monthly living expenses, i.e., food, clothing, shelter, utilities, taxes, transportation, medicine, etc.

Married individuals must gather this information for their spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only one spouse is filing. In a situation where only one spouse files, the income and expenses of the non-filing spouse is required so that the court, the trustee and creditors can evaluate the household's financial position.

When an individual files a chapter 13 petition, an impartial trustee is appointed

to administer the case. 11 U.S.C. § 1302. In some districts, the U.S. trustee or bankruptcy administrator<sup>3</sup> appoints a standing trustee to serve in all chapter 13 cases. 28 U.S.C. § 586(b). The chapter 13 trustee both evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors. 11 U.S.C. § 1302(b).

Filing the petition under chapter 13 "automatically stays" (stops) most collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. Filing the petition does not, however, stay certain types of actions listed under 11 U.S.C. § 362(b), and the stay may be effective only for a short time in some situations. See e.g., 11 U.S.C. § 362(c). The stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally may not initiate or continue lawsuits, wage garnishments, or even make telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Chapter 13 also contains a special automatic stay provision that protects co-debtors. Unless the bankruptcy court authorizes otherwise, a creditor may not seek to collect a "consumer debt" from any individual who is liable along with the debtor. 11 U.S.C. § 1301(a). Consumer

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<sup>3</sup> In North Carolina and Alabama, bankruptcy administrators perform similar functions that U.S. trustees perform in the remaining forty-eight states. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the U.S. trustee program is administered by the Department of Justice. For purposes of this publication, references to U.S. trustees are also applicable to bankruptcy administrators.

debts are those incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. § 101(8).

Individuals may use a chapter 13 proceeding to save their home from foreclosure. The automatic stay stops the foreclosure proceeding as soon as the individual files the chapter 13 petition. The individual may then bring the past-due payments current over a reasonable period of time. Nevertheless, the debtor may still lose the home if the mortgage company completes the foreclosure sale under state law before the debtor files the petition. 11 U.S.C. § 1322(c). The debtor may also lose the home if he or she fails to make the regular mortgage payments that come due after the chapter 13 filing.

Between 20 and 50 days after the debtor files the chapter 13 petition, the chapter 13 trustee will hold a meeting of creditors. If the U.S. trustee or bankruptcy administrator schedules the meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the debtor files. Fed. R. Bankr. P. 2003(a). During this meeting, the trustee places the debtor under oath, and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding his or her financial affairs and the proposed terms of the plan. 11 U.S.C. § 343. If a husband and wife file a joint petition, they both must attend the creditors' meeting and answer questions. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending the creditors' meeting. 11 U.S.C. § 341(c). The parties typically resolve problems with the plan either during or shortly after the creditors' meeting. Generally, the debtor

can avoid problems by making sure that the petition and plan are complete and accurate, and by consulting with the trustee prior to the meeting.

In a chapter 13 case, to participate in distributions from the bankruptcy estate, unsecured creditors must file their claims with the court within 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c). A governmental unit, however, has 180 days from the date the case is filed to file a proof of claim. 11 U.S.C. § 502(b)(9). Creditors should consult with counsel to ensure that their proofs of claim satisfy the requirements of the rules and the code. See e.g., Fed. R. Bankr. P. 3001, et seq.; Local Rule, Appendix 1, Chapter 13 Rule 13-13.

After the meeting of creditors, the debtor, the chapter 13 trustee, and those creditors who wish to attend will come to court for a hearing on the debtor's chapter 13 repayment plan.

### **Chapter 13 Plan and Confirmation Hearing**

Unless the court grants an extension, the debtor must file a repayment plan with the petition or within 15 days after the petition is filed. Fed. R. Bankr. P. 3015. A plan must be submitted for court approval and must provide for payments of fixed amounts to the trustee on a regular basis, typically biweekly or monthly. The trustee then distributes the funds to creditors according to the terms of the confirmed plan, which may offer creditors less than full payment on their claims.

There are three types of claims: priority, secured, and unsecured. Priority claims are those granted special status by the

bankruptcy law, such as most taxes and the costs of bankruptcy proceeding.<sup>4</sup> Secured claims are those for which the creditor has the right take back certain property (i.e., the collateral) if the debtor does not pay the underlying debt. In contrast to secured claims, unsecured claims are generally those for which the creditor has no special rights to collect against particular property owned by the debtor.

The plan must pay priority claims in full unless a particular priority creditor agrees to different treatment of the claim or, in the case of a domestic support obligation, unless the debtor contributes all "disposable income" - discussed below - to a five-year plan. 11 U.S.C. § 1322(a).

If the debtor wants to keep the collateral securing a particular claim, the plan must provide that the holder of the secured claim receive at least the value of the collateral. If the obligation underlying the secured claim was used to buy the collateral (e.g., a car loan), and the debt was incurred within certain time frames before the bankruptcy filing, the plan must provide for full payment of the debt, not just the value of the collateral (which may be less due to depreciation).

Payments to certain secured creditors (i.e., the home mortgage lender), may be made over the original loan repayment schedule (which may be longer than the plan) so long as any arrearage is made up during the plan. The debtor should consult an attorney to determine the proper treatment of secured claims in the plan.

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<sup>4</sup> Section 507 sets forth 10 categories of unsecured claims which Congress has, for public policy reasons, given priority of distribution over other unsecured claims.

The plan need not pay unsecured claims in full as long it provides that the debtor will pay all projected "disposable income" over an "applicable commitment period," and as long as unsecured creditors receive at least as much under the plan as they would receive if the debtor's assets were liquidated under chapter 7. 11 U.S.C. § 1325. In chapter 13, "disposable income" is income (other than child support payments received by the debtor) less amounts reasonably necessary for the maintenance or support of the debtor or dependents and less charitable contributions up to 15% of the debtor's gross income. If the debtor operates a business, the definition of disposable income excludes those amounts which are necessary for ordinary operating expenses. 11 U.S.C. § 1325(b)(2)(A) and (B).

The "applicable commitment period" depends on the debtor's current monthly income. The applicable commitment period must be three years if current monthly income is less than the state median for a family of the same size - and five years if the current monthly income is greater than a family of the same size. 11 U.S.C. § 1325(d). The plan may be less than the applicable commitment period (three or five years) only if unsecured debt is paid in full over a shorter period.

Within 30 days after filing the bankruptcy case, even if the plan has not yet been approved by the court, the debtor must start making plan payments to the trustee. 11 U.S.C. § 1326(a)(1). If any secured loan payments or lease payments come due before the debtor's plan is confirmed (typically home and automobile payments), the debtor must make adequate protection payments directly to the secured lender or lessor -

deducting the amount paid from the amount that would otherwise be paid to the trustee. Id.

No later than 45 days after the meeting of creditors, the bankruptcy judge must hold a confirmation hearing and decide whether the plan is feasible and meets the standards for confirmation set forth in the Bankruptcy Code. 11 U.S.C. §§ 1324, 1325; see also, Local Rule, Appendix 1, Chapter 13 Rule 13-11. Creditors will receive 25 days' notice of the hearing and may object to confirmation. Fed. R. Bankr. P. 2002(b). While a variety of objections may be made, the most frequent ones are that payments offered under the plan are less than creditors would receive if the debtor's assets were liquidated or that the debtor's plan does not commit all of the debtor's projected disposable income for the three or five year applicable commitment period.

If the court confirms the plan, the chapter 13 trustee will distribute funds received under the plan "as soon as is practicable." 11 U.S.C. § 1326(a)(2). If the court declines to confirm the plan, the debtor may file a modified plan. 11 U.S.C. § 1323. The debtor may also convert the case to a liquidation case under chapter 7.<sup>5</sup> 11 U.S.C. § 1307(a). If the court declines to confirm the plan or the modified plan and instead dismisses the case, the court may authorize the trustee to keep some funds for costs, but the trustee must return all remaining funds to the debtor (other than funds already disbursed or due to creditors). 11 U.S.C. § 1326(a)(2).

Occasionally, a change in circumstances may compromise the debtor's ability to make plan payments. For example, a

creditor may object or threaten to object to a plan, or the debtor may inadvertently have failed to list all creditors. In such instances, the plan may be modified either before or after confirmation. 11 U.S.C. §§ 1323, 1329. Modification after confirmation is not limited to an initiative by the debtor, but may be at the request of the trustee or an unsecured creditor. 11 U.S.C. § 1329(a).

### **Making the Plan Work**

The provisions of a confirmed plan bind the debtor and each creditor. 11 U.S.C. § 1327. Once the court confirms the plan, the debtor must make the plan succeed. The debtor must make regular payments to the trustee either directly or through payroll deduction, which will require adjustment to living on a fixed budget for a prolonged period. Furthermore, while confirmation of the plan entitles the debtor to retain property as long as payments are made, the debtor may not incur new debt without consulting the trustee, because additional debt may compromise the debtor's ability to complete the plan. 11 U.S.C. §§ 1305(c), 1322(a)(1), 1327.

If the debtor fails to make the payments due under the confirmed plan, the court may dismiss the case or convert it to a liquidation case under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1307(c). The court may also dismiss or convert the debtor's case if the debtor fails to pay any post-filing domestic support obligations (i.e., child support, alimony), or fails to make required tax filings during the case. 11 U.S.C. §§ 1307(c) and (e), 1308, 521.

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<sup>5</sup> A fee of \$25 is charged for converting a case under chapter 13 to a case under chapter 7.

## **The Chapter 13 Discharge**

The bankruptcy law regarding the scope of the chapter 13 discharge is complex and has recently undergone major changes. Therefore, debtors and creditors should consult competent legal counsel prior to filing regarding the scope of the chapter 13 discharge.

A chapter 13 debtor is entitled to a discharge upon completion of all payments under the chapter 13 plan so long as the debtor: (1) certifies (if applicable) that all domestic support obligations that came due prior to making such certification have been paid; (2) has not received a discharge in a prior case filed within a certain time frame (two years for prior chapter 13 cases and four years for prior chapter 7, 11 and 12 cases); and (3) has completed an approved course in financial management (if the U.S. trustee or bankruptcy administrator for the debtor's district has determined that such courses are available to the debtor). 11 U.S.C. § 1328. The court will not enter the discharge, however, until it determines, after notice and a hearing, that there is no reason to believe there is any pending proceeding that might give rise to a limitation on the debtor's homestead exemption. 11 U.S.C. § 1328(h).

The discharge releases the debtor from all debts provided for by the plan or disallowed (under section 502), with limited exceptions. Creditors provided for in full or in part under the chapter 13 plan may no longer initiate or continue any legal or other action against the debtor to collect the discharged obligations.

As a general rule, the discharge releases the debtor from all debts provided for by the plan or disallowed, with the exception

of certain debts referenced in 11 U.S.C. § 1328. Debts not discharged in chapter 13 include certain long term obligations (such as a home mortgage), debts for alimony or child support, certain taxes, debts for most government funded or guaranteed educational loans or benefit overpayments, debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on the debtor's conviction of a crime. To the extent that they are not fully paid under the chapter 13 plan, the debtor will still be responsible for these debts after the bankruptcy case has concluded. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, and debts for restitution or damages awarded in a civil case for willful or malicious actions by the debtor that cause personal injury or death to a person will be discharged unless a creditor timely files and prevails in an action to have such debts declared nondischargeable. 11 U.S.C. §§ 1328, 523(c); Fed. R. Bankr. P. 4007(c).

The discharge in a chapter 13 case is somewhat broader than in a chapter 7 case. Debts dischargeable in a chapter 13, but not in chapter 7, include debts for willful and malicious injury to property (as opposed to a person), debts incurred to pay nondischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings. 11 U.S.C. § 1328(a).

## **The Chapter 13 Hardship Discharge**

After confirmation of a plan, circumstances may arise that prevent the debtor from completing the plan. In such situations, the debtor may ask the court to grant a "hardship discharge." 11 U.S.C. § 1328(b). Generally, such a discharge is available only if: (1) the debtor's failure to complete plan payments is due to circumstances beyond the debtor's control and through no fault of the debtor; (2) creditors have received at least as much as they would have received in a chapter 7 liquidation case; and (3) modification of the plan is not possible. Injury or illness that precludes employment sufficient to fund even a modified plan may serve as the basis for a hardship discharge. The hardship discharge is more limited than the discharge described above and does not apply to any debts that are nondischargeable in a chapter 7 case. 11 U.S.C. § 523.

# Discharge in Bankruptcy

## What is a discharge in bankruptcy?

A bankruptcy discharge releases the debtor from personal liability for certain specified types of debts. In other words, the debtor is no longer legally required to pay any debts that are discharged. The discharge is a permanent order prohibiting the creditors of the debtor from taking any form of collection action on discharged debts, including legal action and communications with the debtor, such as telephone calls, letters, and personal contacts.

Although a debtor is not personally liable for discharged debts, a valid lien (i.e., a charge upon specific property to secure payment of a debt) that has not been avoided (i.e., made unenforceable) in the bankruptcy case will remain after the bankruptcy case. Therefore, a secured creditor may enforce the lien to recover the property secured by the lien.

## When does the discharge occur?

The timing of the discharge varies, depending on the chapter under which the case is filed. In a chapter 7 (liquidation) case, for example, the court usually grants the discharge promptly on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case for substantial abuse (60 days following the first date set for the 341 meeting). Typically, this occurs about four months after the date the debtor files the petition with the clerk of the bankruptcy court. In individual chapter 11 cases, and in cases under chapter 12 (adjustment of

debts of a family farmer or fisherman) and 13 (adjustment of debts of an individual with regular income), the court generally grants the discharge as soon as practicable after the debtor completes all payments under the plan. Since a chapter 12 or chapter 13 plan may provide for payments to be made over three to five years, the discharge typically occurs about four years after the date of filing. The court may deny an individual debtor's discharge in a chapter 7 or 13 case if the debtor fails to complete "an instructional course concerning financial management." The Bankruptcy Code provides limited exceptions to the "financial management" requirement if the U.S. trustee or bankruptcy administrator determines there are inadequate educational programs available, or if the debtor is disabled or incapacitated or on active military duty in a combat zone.

## How does the debtor obtain a discharge?

Unless there is litigation involving objections to the discharge, the debtor will usually automatically receive a discharge. The Federal Rules of Bankruptcy Procedure provide for the clerk of the bankruptcy court to mail a copy of the order of discharge to all creditors, the U.S. trustee, the trustee in the case, and the trustee's attorney, if any. The debtor and the debtor's attorney also receive copies of the discharge order. The notice, which is simply a copy of the final order of discharge, is not specific as to those debts determined by the court to be non-dischargeable, i.e., not covered by the discharge. The notice informs creditors generally that the debts owed to them have been discharged and that they

should not attempt any further collection. They are cautioned in the notice that continuing collection efforts could subject them to punishment for contempt. Any inadvertent failure on the part of the clerk to send the debtor or any creditor a copy of the discharge order promptly within the time required by the rules does not affect the validity of the order granting the discharge.

### **Are all of the debtor's debts discharged or only some?**

Not all debts are discharged. The debts discharged vary under each chapter of the Bankruptcy Code. Section 523(a) of the Code specifically excepts various categories of debts from the discharge granted to individual debtors. Therefore, the debtor must still repay those debts after bankruptcy. Congress has determined that these types of debts are not dischargeable for public policy reasons (based either on the nature of the debt or the fact that the debts were incurred due to improper behavior of the debtor, such as the debtor's drunken driving).

There are 19 categories of debt excepted from discharge under chapters 7, 11, and 12. A more limited list of exceptions applies to cases under chapter 13.

Generally speaking, the exceptions to discharge apply automatically if the language prescribed by section 523(a) applies. The most common types of nondischargeable debts are certain types of tax claims, debts not set forth by the debtor on the lists and schedules the debtor must file with the court, debts for spousal or child support or alimony, debts for willful and malicious injuries to person or property, debts to

governmental units for fines and penalties, debts for most government funded or guaranteed educational loans or benefit overpayments, debts for personal injury caused by the debtor's operation of a motor vehicle while intoxicated, debts owed to certain tax-advantaged retirement plans, and debts for certain condominium or cooperative housing fees.

The types of debts described in sections 523(a)(2), (4), and (6) (obligations affected by fraud or maliciousness) are not automatically excepted from discharge. Creditors must ask the court to determine that these debts are excepted from discharge. In the absence of an affirmative request by the creditor and the granting of the request by the court, the types of debts set out in sections 523(a)(2), (4), and (6) will be discharged.

A slightly broader discharge of debts is available to a debtor in a chapter 13 case than in a chapter 7 case. Debts dischargeable in a chapter 13, but not in chapter 7, include debts for willful and malicious injury to property, debts incurred to pay non-dischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings. Although a chapter 13 debtor generally receives a discharge only after completing all payments required by the court-approved (i.e., "confirmed") repayment plan, there are some limited circumstances under which the debtor may request the court to grant a "hardship discharge" even though the debtor has failed to complete plan payments. Such a discharge is available only to a debtor whose failure to complete plan payments is due to circumstances beyond the debtor's control. The scope of a chapter 13



"hardship discharge" is similar to that in a chapter 7 case with regard to the types of debts that are excepted from the discharge. A hardship discharge also is available in chapter 12 if the failure to complete plan payments is due to "circumstances for which the debtor should not justly be held accountable."

### **Does the debtor have the right to a discharge or can creditors object to the discharge?**

In chapter 7 cases, the debtor does not have an absolute right to a discharge. An objection to the debtor's discharge may be filed by a creditor, by the trustee in the case, or by the U.S. trustee. Creditors receive a notice shortly after the case is filed that sets forth much important information, including the deadline for objecting to the discharge. To object to the debtor's discharge, a creditor must file a complaint in the bankruptcy court before the deadline set out in the notice. Filing a complaint starts a lawsuit referred to in bankruptcy as an "adversary proceeding."

The court may deny a chapter 7 discharge for any of the reasons described in section 727(a) of the Bankruptcy Code, including failure to provide requested tax documents; failure to complete a course on personal financial management; transfer or concealment of property with intent to hinder, delay, or defraud creditors; destruction or concealment of books or records; perjury and other fraudulent acts; failure to account for the loss of assets; violation of a court order or an earlier discharge in an earlier case commenced within certain time frames (discussed below) before the date the petition was filed. If the issue of the

debtor's right to a discharge goes to trial, the objecting party has the burden of proving all the facts essential to the objection.

In chapter 12 and chapter 13 cases, the debtor is usually entitled to a discharge upon completion of all payments under the plan. As in chapter 7, however, discharge may not occur in chapter 13 if the debtor fails to complete a required course on personal financial management. A debtor is also ineligible for a discharge in chapter 13 if he or she received a prior discharge in another case commenced within time frames discussed the next paragraph. Unlike chapter 7, creditors do not have standing to object to the discharge of a chapter 12 or chapter 13 debtor. Creditors can object to confirmation of the repayment plan, but cannot object to the discharge if the debtor has completed making plan payments.

### **Can a debtor receive a second discharge in a later chapter 7 case?**

The court will deny a discharge in a later chapter 7 case if the debtor received a discharge under chapter 7 or chapter 11 in a case filed within eight years before the second petition is filed. The court will also deny a chapter 7 discharge if the debtor previously received a discharge in a chapter 12 or chapter 13 case filed within six years before the date of the filing of the second case unless (1) the debtor paid all "allowed unsecured" claims in the earlier case in full, or (2) the debtor made payments under the plan in the earlier case totaling at least 70 percent of the allowed unsecured claims and the debtor's plan was proposed in good faith and the payments represented

the debtor's best effort. A debtor is ineligible for discharge under chapter 13 if he or she received a prior discharge in a chapter 7, 11, or 12 case filed four years before the current case or in a chapter 13 case filed two years before the current case.

### **Can the discharge be revoked?**

The court may revoke a discharge under certain circumstances. For example, a trustee, creditor, or the U.S. trustee may request that the court revoke the debtor's discharge in a chapter 7 case based on allegations that the debtor: obtained the discharge fraudulently; failed to disclose the fact that he or she acquired or became entitled to acquire property that would constitute property of the bankruptcy estate; committed one of several acts of impropriety described in section 727(a)(6) of the Bankruptcy Code; or failed to explain any misstatements discovered in an audit of the case or fails to provide documents or information requested in an audit of the case.

Typically, a request to revoke the debtor's discharge must be filed within one year of the discharge or, in some cases, before the date that the case is closed. The court will decide whether such allegations are true and, if so, whether to revoke the discharge.

In chapter 11, 12, and 13 cases, if confirmation of a plan or the discharge is obtained through fraud, the court can revoke the order of confirmation or discharge.

### **May the debtor pay a discharged debt after the bankruptcy case has been concluded?**

A debtor who has received a discharge may voluntarily repay any discharged debt. A debtor may repay a discharged debt even though it can no longer be legally enforced. Sometimes a debtor agrees to repay a debt because it is owed to a family member or because it represents an obligation to an individual for whom the debtor's reputation is important, such as a family doctor.

### **What can the debtor do if a creditor attempts to collect a discharged debt after the case is concluded?**

If a creditor attempts collection efforts on a discharged debt, the debtor can file a motion with the court, reporting the action and asking that the case be reopened to address the matter. The bankruptcy court will often do so to ensure that the discharge is not violated. The discharge constitutes a permanent statutory injunction prohibiting creditors from taking any action, including the filing of a lawsuit, designed to collect a discharged debt. A creditor can be sanctioned by the court for violating the discharge injunction. The normal sanction for violating the discharge injunction is civil contempt, which is often punishable by a fine.

### **May an employer terminate a debtor's employment solely because the person was a debtor or failed to pay a discharged debt?**

The law provides express prohibitions against discriminatory treatment of debtors by both governmental units and private employers. A governmental unit or private employer may not discriminate against a person solely because the

person was a debtor, was insolvent before or during the case, or has not paid a debt that was discharged in the case. The law prohibits the following forms of governmental discrimination: terminating an employee; discriminating with respect to hiring; or denying, revoking, suspending, or declining to renew a license, franchise, or similar privilege. A private employer may not discriminate with respect to employment if the discrimination is based solely upon the bankruptcy filing.

**How can the debtor obtain another copy of the discharge order?**

If the debtor loses or misplaces the discharge order, another copy can be

obtained by contacting the clerk of the bankruptcy court that entered the order. The clerk will charge a fee for searching the court records and there will be additional fees for making and certifying copies. If the case has been closed and archived there will also be a retrieval fee, and obtaining the copy will take longer.

The discharge order may be available electronically. The PACER system provides the public with electronic access to selected case information through a personal computer located in many clerk's offices. The debtor can also access PACER. Users must set up an account to acquire access to PACER, and must pay a per-page fee to download and copy documents filed electronically.

## UNITED STATES BANKRUPTCY COURT REQUIRED LISTS, SCHEDULES, STATEMENTS, AND FEES

### Voluntary Chapter 7 Case

- ☐ **Filing Fee of \$245.** If the fee is to be paid in installments or the debtor requests a waiver of the fee, the debtor must be an individual and must file a signed application for court approval. Official Form 3A or 3B and Fed.R.Bankr.P. 1006(b), (c)
- ☐ **Administrative fee of \$39 and trustee surcharge of \$15.** If the debtor is an individual and the court grants the debtor's request, these fees are payable in installments or may be waived.
- ☐ **Voluntary Petition** (Official Form 1); **Names and addresses of all creditors** of the debtor. Must be filed WITH the petition. Fed.R.Bankr.P. 1007(a)(1).
- ☐ **Notice to Individual Debtor with Primarily Consumer Debts** under 11 U.S.C. § 342(b) (Director's Form 201A/B), if applicable. Required if the debtor is an individual with primarily consumer debts. The notice must be GIVEN to the debtor before the petition is filed. Certification that the notice has been given must be FILED with the petition or within 15 days. 11 U.S.C. §§ 342(b), 521(a)(1)(B)(iii), 707(a)(3). Official Form 1 contains spaces for the certification.
- ☐ **Notice to debtor by "bankruptcy petition preparer"** (Official Form 19). Required if a "bankruptcy petition preparer" prepares the petition. Must be submitted WITH the petition. 11 U.S.C. § 110(b)(2).
- ☐ **Statement of Social Security Number** (Official Form 21). Required if the debtor is an individual. Must be submitted WITH the petition. Fed.R.Bankr.P. 1007(f).
- ☐ **Individual Debtor's Statement of Compliance with Credit Counseling Requirement** (Exhibit D to Official Form 1); **Certificate of Credit Counseling and Debt Repayment Plan**, if applicable; **Section 109(h)(3) certification or § 109(h)(4) request**, if applicable. Exhibit D is required if the debtor is an individual. Exhibit D must be filed WITH the petition. If applicable, the Certificate of Credit Counseling and Debt Repayment Plan must be filed with the petition or within 14 days. If applicable, the § 109(h)(3) certification or the § 109(h)(4) request must be filed WITH the petition. Fed.R.Bankr.P. 1007(b)(3), (c).
- ☐ **Statement disclosing compensation paid or to be paid to a "bankruptcy petition preparer"** (Director's Form 280). Required if a "bankruptcy petition preparer" prepares the petition. Must be submitted WITH the petition. 11 U.S.C. § 110(h)(2).
- ☐ **Statement of current monthly income, etc.** (Official Form 22A). Required if the debtor is an individual. Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Schedules of assets and liabilities** (Official Form 6). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Schedule of executory contracts and unexpired leases** (Schedule G of Official Form 6). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Schedules of current income and expenditures.** All debtors must file these schedules. If the debtor is an individual, Schedules I and J of Official Form 6 must be used for this purpose. Must be filed with the petition or within 14 days. 11 U.S.C. § 521(1) and Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Statement of financial affairs** (Official Form 7). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Copies of all payment advices or other evidence of payment** received by the debtor from any employer within 60 days before the filing of the petition. Required if the debtor is an individual. Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Statement of intention regarding secured property and unexpired leases** (Official Form 8). Required ONLY if the debtor is an individual and the schedules of assets and liabilities contain debts secured by property of the estate or personal property subject to an unexpired lease. Must be filed within 30 days or by the date set for the Section 341 meeting of creditors, whichever is earlier. 11 U.S.C. §§ 362(h) and 521(a)(2).
- ☐ **Statement disclosing compensation paid or to be paid to the attorney** for the debtor (Director's Form 203). Required if the debtor is represented by an attorney. Must be filed within 14 days or any other date set by the court. 11 U.S.C. § 329 and Fed.R.Bankr.P. 2016(b).
- ☐ **Certification of Completion of Instructional Course Concerning Financial Management** (Official Form 23), if applicable. Required if the debtor is an individual. Must be filed within 60 days of the first date set for the meeting of creditors. 11 U.S.C. § 727(a)(11) and Fed.R.Bankr.P. 1007(b)(7), (c).

**REQUIRED LISTS, SCHEDULES, STATEMENTS, AND FEES**  
**Voluntary Chapter 11 Case**

- ☐ **Filing fee of \$1,000.** If the fee is to be paid in installments, the debtor must be an individual and must file a signed application for court approval. Official Form 3A and Fed.R.Bankr.P. 1006(b).
- ☐ **Administrative fee of \$39.** If the debtor is an individual and the court grants the debtor's request, this fee is payable in installments.
- ☐ **United States Trustee quarterly fee.** The debtor, or trustee if one is appointed, is required also to pay a fee to the United States trustee at the conclusion of each calendar quarter until the case is dismissed or converted to another chapter. The calculation of the amount to be paid is set out in 28 U.S.C. 1930(a)(6).
- ☐ **Voluntary Petition** (Official Form 1); **Names and addresses of all creditors.** Must be filed **WITH** the petition. Fed.R.Bankr.P. 1007(a)(1).
- ☐ **Notice to Individual Debtor with Primarily Consumer Debts** under 11 U.S.C. § 342(b) (Director's Form 201A/B), if applicable. Required if the debtor is an individual with primarily consumer debts. The notice must be **GIVEN** to the debtor before the petition is filed. Certification that the notice has been given must be **FILED** with the petition or within 15 days. 11 U.S.C. §§ 342(b), 521(a)(1)(B)(iii), 1112(e). Official Form 1 contains spaces for the certification.
- ☐ **Notice to debtor by "bankruptcy petition preparer"** (Official Form 19). Required if a "bankruptcy petition preparer" prepares the petition. Must be submitted **WITH** the petition. 11 U.S.C. § 110(b)(2).
- ☐ **Statement of Social Security Number** (Official Form 21). Required if the debtor is an individual. Must be submitted **WITH** the petition. Fed.R.Bankr.P. 1007(f).
- ☐ **Individual Debtor's Statement of Compliance with Credit Counseling Requirement** (Exhibit D to Official Form 1); **Certificate of Credit Counseling and Debt Repayment Plan**, if applicable; **Section 109(h)(3) certification or § 109(h)(4) request**, if applicable. Required if the debtor is an individual. Exhibit D must be filed **WITH** the petition. If applicable, the Certificate of Credit Counseling and Debt Repayment Plan must be filed with the petition or within 14 days. If applicable, the § 109(h)(3) certification or the § 109(h)(4) request must be filed **WITH** the petition. Fed.R.Bankr.P. 1007(b)(3), (c).
- ☐ **Statement disclosing compensation paid or to be paid to a "bankruptcy petition preparer"** (Director's Form 280). Required if a "bankruptcy petition preparer" prepares the petition. Must be submitted **WITH** the petition. 11 U.S.C. § 110(h)(2).
- ☐ **Statement of Current Monthly Income** (Official Form 22B). Required if the debtor is an individual. Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- List of Creditors holding the 20 largest unsecured claims** (Official Form 4). Must be filed **WITH** the petition. Fed.R.Bankr.P. 1007(d).
- ☐ **Names and addresses of equity security holders of the debtor.** Must be filed with the petition or within 14 days, unless the court orders otherwise. Fed.R.Bankr.P. 1007(a)(3).
- ☐ **Schedules of Assets and Liabilities (Official Form 6).** Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Schedule of executory contracts and unexpired leases** (Schedule G of Official Form 6). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Schedules of Current Income and Expenditures.** All debtors must file these schedules. If the debtor is an individual, Schedules I and J of Official Form 6 must be used for this purpose. Must be filed with the petition or within 14 days. 11 U.S.C. § 521(1) and Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Statement of Financial Affairs (Official Form 7).** Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Copies of all payment advices or other evidence of payment** received by debtor from any employer within 60 days before the filing of the petition. Required if the debtor is an individual. Must be filed **WITH** the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Statement disclosing compensation paid or to be paid to the attorney** for the debtor (Director's Form 203), if applicable. Required if the debtor is represented by an attorney. Must be filed within 14 days or any other date set by the court. 11 U.S.C. § 329 and Fed.R.Bankr.P. 2016(b).
- ☐ **Certificate of Completion of Instructional Course Concerning Financial Management** (Official Form 23), if applicable. Required if the debtor is an individual and § 1141(d)(3) applies. Must be filed no later than the date of the last payment under the plan or the filing of a motion for a discharge under § 1141(d)(5)(B). 11 U.S.C. § 1141(d)(3) and Fed.R.Bankr.P. 1007(b)(7), (c).
- ☐ **Statement concerning pending proceedings of the kind described in § 522(q)(1)**, if applicable. Required if the debtor is an individual and has claimed exemptions under state or local law as described in § 522(b)(3) in excess of \$146,450.\* Must be filed no later than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under § 1141(d)(5)(B). 11 U.S.C. § 1141(d)(5)(C) and Fed.R.Bankr.P. 1007(b)(8), (c).

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\* Amount subject to adjustment on 4/1/13 and every three years thereafter with respect to cases commenced on or after the date of adjustment.

## REQUIRED LISTS, SCHEDULES, STATEMENTS, AND FEES

### Chapter 12 Case

- ☐ **Filing Fee of \$200.** If the fee is to be paid in installments, the debtor must be an individual and must file a signed application for court approval. Official Form 3A and Fed.R.Bankr.P. 1006(b).
- ☐ **Administrative fee of \$39.** If the debtor is an individual and the court grants the debtor's request, this fee is payable in installments.
- ☐ **Voluntary Petition** (Official Form 1). **Names and addresses of all creditors** of the debtor. Must be filed WITH the petition. Fed.R.Bankr.P. 1007(a)(1)
- ☐ **Notice to Individual Debtor with Primarily Consumer Debts** under 11 U.S.C. § 342(b) (Director's Form 201A/B), if applicable. Required if the debtor is an individual with primarily consumer debts. The notice must be GIVEN to the debtor before the petition is filed. Certification that the notice has been given must be FILED with the court in a timely manner. 11 U.S.C. §§ 342(b), 521(a)(1)(B)(iii). Official Form 1 contains spaces for the certification.
- ☐ **Notice to debtor by "bankruptcy petition preparer,"** (Official Form 19). Required if a "bankruptcy petition preparer" prepares the petition. Must be submitted WITH the petition. 11 U.S.C. § 110(b)(2).
- ☐ **Statement of Social Security Number** (Official Form 21). Required if the debtor is an individual. Must be submitted WITH the petition. Fed.R.Bankr.P. 1007(f).
- ☐ **Individual Debtor's Statement of Compliance with Credit Counseling Requirement** (Exhibit D to Official Form 1). **Certificate of Credit Counseling and Debt Repayment Plan**, if applicable. **Section 109(h)(3) certification or § 109(h)(4) request**, if applicable. Required if the debtor is an individual. Exhibit D must be filed WITH the petition. If applicable, the Certificate of Credit Counseling and Debt Repayment Plan must be filed with the petition or within 14 days. If applicable, the § 109(h)(3) certification or the § 109(h)(4) request must be filed WITH the petition. Fed.R.Bankr.P. 1007(b)(3), (c).
- ☐ **Statement disclosing compensation paid or to be paid to a "bankruptcy petition preparer"** (Director's Form 280). Required if a "bankruptcy petition preparer" prepares the petition. Must be submitted WITH the petition. 11 U.S.C. § 110(h)(2).
- ☐ **Schedules of Assets and Liabilities** (Official Form 6). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Schedule of Executory Contracts and Unexpired Leases** (Schedule G of Official Form 6). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Schedules of Current Income and Expenditures.** All debtors must file these schedules. If the debtor is an individual, Schedule I and J of Official Form 6 must be used for this purpose. Must be filed with the petition or within 14 days. 11 U.S.C. § 521(1) and Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Statement of Financial Affairs** (Official Form 7). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Copies of all payment advices** or other evidence of payment received by the debtor from any employer within 60 days before the filing of the petition if the debtor is an individual. Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).
- ☐ **Statement disclosing compensation paid or to be paid to the attorney** for the debtor (Director's Form 203), if applicable. Must be filed within 14 days or any other date set by the court. 11 U.S.C. § 329 and Fed.R.Bankr.P. 2016(b).
- ☐ **Chapter 12 Plan.** Must be filed within 90 days. 11 U.S.C. § 1221.
- ☐ **Statement concerning pending proceedings of the kind described in § 522(q)(1)**, if applicable. Required if the debtor is an individual and has claimed exemptions under state or local law as described in § 522(b)(3) in excess of \$146,450.\* Must be filed no later than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under § 1228(b). 11 U.S.C. § 1228(f) and Fed.R.Bankr.P. 1007(b)(8), (c).

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\* Amount subject to adjustment on 4/1/13 and every three years thereafter with respect to cases commenced on or after the date of adjustment.

**REQUIRED LISTS, SCHEDULES, STATEMENTS, AND FEES****Chapter 13 Case**

☐ **Filing fee of \$235.** If the fee is to be paid in installments, the debtor must file a signed application for court approval. Official Form 3A and Fed.R.Bankr.P. 1006(b).

☐ **Administrative fee of \$39.** If the court grants the debtor's request, this fee is payable in installments.

☐ **Voluntary Petition** (Official Form 1); **Names and addresses of all creditors** of the debtor. Must be filed WITH the petition. Fed.R.Bankr.P. 1007(a)(1).

☐ **Notice to Individual Debtor with Primarily Consumer Debts** under 11 U.S.C. § 342(b) (Director's Form 201A/B), if applicable. Required if the debtor is an individual with primarily consumer debts. The notice must be GIVEN to the debtor before the petition is filed. Certification that the notice has been given must be FILED with the petition or within 15 days. 11 U.S.C. §§ 342(b), 521(a)(1)(B)(iii), 1307(c)(9). Official Form 1 contains spaces for the certification.

☐ **Notice to debtor by "bankruptcy petition preparer,"** (Official Form 19). Required if a "bankruptcy petition preparer" prepares the petition. Must be submitted WITH the petition. 11 U.S.C. § 110(b)(2).

☐ **Statement of Social Security Number** (Official Form 21). Must be submitted WITH the petition. Fed.R.Bankr.P. 1007(f).

☐ **Individual Debtor's Statement of Compliance with Credit Counseling Requirement** (Exhibit D to Official Form 1); **Certificate of Credit Counseling and Debt Repayment Plan**, if applicable; **Section 109(h)(3) certification or § 109(h)(4) request**, if applicable. Exhibit D must be filed WITH the petition. If applicable, the Certificate of Credit Counseling and Debt Repayment Plan must be filed with the petition or within 14 days. If applicable, the § 109(h)(3) certification or the § 109(h)(4) request must be filed WITH the petition. Fed.R.Bankr.P. 1007(b)(3), (c).

☐ **Statement disclosing compensation paid or to be paid to a "bankruptcy petition preparer"** (Director's Form 280). Required if a "bankruptcy petition preparer" prepares the petition. Must be submitted WITH the petition. 11 U.S.C. § 110(h)(2).

**Statement of Current Monthly Income, etc.** (Official Form 22C). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007.

☐ **Schedules of Assets and Liabilities** (Official Form 6). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).

☐ **Schedule of Executory Contracts and Unexpired Leases** (Schedule G of Official Form 6). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).

☐ **Schedules of Current Income and Expenditures** (Schedules I and J of Official Form 6). Must be filed with the petition or within 14 days. 11 U.S.C. § 521(1) and Fed.R.Bankr.P. 1007(b), (c).

☐ **Statement of Financial Affairs** (Official Form 7). Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).

☐ **Copies of all payment advices or other evidence of payment** received by the debtor from any employer within 60 days before the filing of the petition. Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 1007(b), (c).

☐ **Chapter 13 Plan.** Must be filed with the petition or within 14 days. Fed.R.Bankr.P. 3015.

☐ **Statement disclosing compensation paid or to be paid to the attorney** for the debtor (Director's Form 203), if applicable. Must be filed within 14 days or any other date set by the court. 11 U.S.C. § 329 and Fed.R.Bankr.P. 2016(b).

☐ **Certificate of Completion of Instructional Course Concerning Financial Management** (Official Form 23). Must be filed no later than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under § 1328(b). 11 U.S.C. § 1328(g)(1) and Fed.R.Bankr.P. 1007(b)(7), (c).

☐ **Statement concerning pending proceedings of the kind described in § 522(q)(1)**, if applicable. Required if the debtor has claimed exemptions under state or local law as described in § 522(b)(3) in excess of \$146,450.\* Must be filed no later than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under § 1328(b). 11 U.S.C. § 1328(h) and Fed.R.Bankr.P. 1007(b)(8), (c).

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\* Amount subject to adjustment on 4/1/13 and every three years thereafter with respect to cases commenced on or after the date of adjustment.



## **GLOSSARY**

### **ADVERSARY PROCEEDING**

A lawsuit arising in a bankruptcy case that is commenced by the filing of a complaint in the Bankruptcy Court.

### **AFFIDAVIT**

A written statement of facts, confirmed by the oath taken before an officer having authority to administer such oath (such as a notary public) or affirmation of the party making it. See also **VERIFICATION**.

### **ANSWER**

A defendant's response to a complaint filed in an adversary proceeding. Since the defendant may be a plaintiff, but also a defendant in counterclaim, the response is also called an *Answer*.

### **APPELLANT**

The party who files and seeks an appeal of a judge's decision.

### **APPELLEE**

The part against whom the appeal has been taken. The appellee is the party who has no interest in objecting to the court's judgment, decision or order.

### **APPLICATION**

A formal request, usually in writing, to the court to grant certain relief. See also, **MOTION**.

### **BAR DATE**

Traditionally the last date set to take a specific action.

### **CONFIRMATION**

Approval of a plan for a debtor to pay creditors provided that the specific criteria are met.



**CONTINGENT CLAIM**

A claim that may be owed by the debtor under certain circumstances, for example, where the debtor is a cosigner on another person's loan and that person fails to pay.

**DISCOVERY**

The process where parties exchange and obtain information about their respective positions. See Fed.R. Bankr. P. 7026, et seq.

**DISMISSAL**

An order or judgment terminating a motion, adversary proceeding or bankruptcy case.

**DISMISSAL WITH PREJUDICE**

An order or judgment terminating a motion, adversary proceeding or bankruptcy case that prohibits the party from bringing the same case, claim or cause of action again, or for a specific period of time (see e.g. § 109(g)).

**EXECUTORY CONTRACT OR LEASE**

Contracts or leases under which both parties to the agreement have duties remaining to be performed or have not been fully completed. If a contract or lease is executory, a debtor may continue to fulfill the terms of the contract or lease ("assume" it) or choose to cancel the contract or lease ("reject" it). Examples of an executory contract are: a lease for a residence, car or equipment; an employment agreement; a home improvement contract; a service contract; or a contract for delivery of goods in the future.

**FRAUDULENT CONVEYANCE**

A transfer of debtor's property made with intent to defraud or for which the debtor receives less than the transferred property's value.

**INSIDER**

A relative, friend, co-worker or other person of close relation of an individual debtor or a person with a close relationship to the debtor.

**JURISDICTION**

The legal authority the Court has to hear and decide a case.

**LIEN**

A charge upon specific property designed to secure payment from a debtor or performance of an obligation.

**LIQUIDATE**

To convert assets into cash.

**LIQUIDATED CLAIM**

A creditor's claim for a fixed amount of money.

**MOTION**

An application for relief or request for an order of the Court presented to the Court. Certain motions have a response deadline by which another party shall respond or object to the relief requested in the motion.

**MOTION FOR RELIEF FROM STAY**

A request by a creditor for an order terminating and/or limiting the automatic stay to enable the creditor to take an action that would otherwise be prohibited by the automatic stay.

**NONDISCHARGEABLE DEBT**

A debt that will not be subject to the discharge. See 11 U.S.C. §§ 523(a), 1328(a).

**OBJECTION TO DISCHARGE**

An objection, filed by a party in interest, to the debtor being released from personal liability for any or all debts. This is brought by an **ADVERSARY PROCEEDING**.

**OBJECTION TO EXEMPTION**

A trustee's or creditor's objection to a debtor's attempt to claim certain property as exempt.

**ORDER**

An order is a judicial decree resolving an issue or question raised before the Court that grants relief, denies relief, or directs a party to perform an action or to refrain from taking action.

**ORDER FOR RELIEF**

An injunction that stops all proceedings against the debtor and the debtor's property. The order for relief, or automatic stay is effective immediately upon the filing of a voluntary petition, subject to the limitations set forth in § 362.

**PARTY IN INTEREST**

A party who is actually and substantially interested in the subject matter, as distinguished from one who has only a nominal or technical interest in it.

**PLEADING**

A written document where a party alleges and/or counter alleges facts giving rise to a legal action or request for relief.

**PREFERENCE**

Certain payments or transfers of a debtor's property to a creditor within 90 days before the filing of the bankruptcy case may be considered preferential, and a trustee may seek to recover those payments on behalf of the estate. See § 547.

**PRIORITY CLAIM**

A claim that is entitled to be paid before general unsecured claims. See § 507.

**PROOF OF CLAIM**

A written statement identifying the amount and reason a debtor owes a creditor money. See Official Form 10.

**REAFFIRMATION AGREEMENT**

An agreement between a debtor and a creditor in which the debtor agrees to pay all or a portion of a debt that would be otherwise dischargeable.

**REDEMPTION**

Where the debtor pays the creditor the full current or "market value" of property that is secured by a purchase money security agreement. In exchange, the lien on the property is extinguished.

**SETOFF**

A claim by a debtor that the creditor owes the debtor money which should be subtracted from the amount claimed by creditor. By claiming a setoff the debtor does not necessarily dispute the creditor's claim, but he/she claims the right to prove that the creditor owes him/her an amount of money from some other transaction and that the amount should be deducted from the creditor's claim.

**STIPULATION**

A voluntary agreement between opposing parties.

**SUMMONS**

An official court document informing the party served that an action has been filed against them, the court where the summons originated and that the party is required to appear, on the date indicated on the summons, and answer the complaint in such action.

**TRANSCRIPT**

A written record prepared by the court reporter of the proceedings that occurred in Court.

**UNITED STATES TRUSTEE**

An officer of the Department of Justice who supervises trustees and the administration of bankruptcy estates. The U.S. Trustee appoints trustees, and monitors plans, disclosure statements, creditors' committees, applications for compensation, and the process of bankruptcy case, in addition to performing other statutory duties (see 28 U.S.C. § 586).

**UNDERSECURED CLAIM**

A claim secured by property that has a value less than the amount owed.

**UNLIQUIDATED CLAIM**

A claim for which a specific value has not been determined.

**UNSCHEDULED DEBT**

A debt that should have been listed in the schedules filed with the Court but was not.

**UNSECURED CLAIM**

A claim with respect to a debt, the payment of which is not backed up by collateral or a lien on property of the debtor.

**UNSECURED DEBT**

A financial obligation that is not backed by a security agreement or a lien on property of the debtor.

**VACATE**

To cancel, annul or render of no effect. If a judgment or order is vacated, it is as if the order or judgment was never entered.

**VENUE**

The proper locality of a legal proceeding.

**VERIFICATION**

Confirmation of the correctness, truth, or authenticity of a complaint, statement or document. Federal Rules of Bankruptcy Procedure 1008 requires that bankruptcy petitions, lists, schedules, statements, and amendments to be verified as provided in 28 U.S.C. § 1746.

*For additional definitions of terms used in Bankruptcy, please refer to 11 U.S.C. § 101.*